

# **OFFICE COPY**

## **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1961**

**No. 242**

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**THE GLIDDEN COMPANY, ETC., PETITIONER,**

*vs.*

**OLGA ZDANOK, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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**PETITION FOR CERTIORARI FILED JULY 21, 1961  
CERTIORARI GRANTED OCTOBER 9, 1961**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 242

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THE GLIDDEN COMPANY, ETC., PETITIONER,

*vs.*

OLGA ZDANOK, ET AL.

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 30, 1961



[fol. 1]

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

No. 217—October Term, 1960.

(Argued February 8, 1961.)

Docket No. 26542

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OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS and MARCELLE KREISCHER,  
Plaintiffs-Appellants,

—v.—

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,  
a Foreign Corporation, Defendant-Appellee.

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Before: Lumbard, Chief Judge, Madden, Judge, United States Court of Claims,\* and Waterman, Circuit Judge.

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OPINION—March 28, 1961

Action by former employees for damages for breach of collective bargaining agreement. The United States District Court for the Southern District of New York, Edmund L. Palmieri, J., held that plaintiffs had no rights to preserve seniority status under the expired collective agreement. 185 F. Supp. 441. Plaintiffs appealed. The Court of Appeals, Madden, Judge, United States Court of Claims, held [fol. 2] that a state court's decision refusing to compel arbitration was not res judicata of plaintiffs' claims, that plaintiffs were entitled individually to enforce their seniority rights under the collective agreement, and that plaintiffs' rights under the agreement were violated when their employer deprived them of continued employment with accrued seniority at the employer's new plant location.

Reversed.

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\* Sitting by designation.

Morris Shapiro, New York, N. Y. (Harry Katz, Sahn, Shapiro & Epstein, New York, N. Y., on the brief), for plaintiffs-appellants.

Chester Bordeau, New York, N. Y. (Charles C. Humpstone, White & Case, New York, N. Y., on the brief), for defendant-appellee.

**MADDEN, Judge:**

The plaintiffs sued in the District Court for the Southern District of New York for damages for alleged breach by the defendant of a contract made for their benefit by a labor union. The District Court had jurisdiction because of diversity of citizenship. The Court decided that they were not entitled to recover, 185 F. Supp. 441, and they have appealed.

From 1929 until November 30, 1957, the defendant operated a plant at Elmhurst, New York, known as its Durkee Famous Foods Division. The plaintiffs are members of General Warehousemen's Union, Local 852, which is affiliated with the Teamsters' Union. The defendant and Local 852 had had collective bargaining agreements since December 1, 1949, each agreement covering a two-year period. The last agreement covered the period December 1, 1955 to November 30, 1957.

[fol. 3] Each agreement contained a provision establishing a system of seniority which required that in case of a curtailment of production, employees were to be laid off in the reverse order of seniority. If, at the time he was laid off, an employee had had five or more years of continuous employment, his seniority would entitle him to be re-employed if an opening for reemployment for one having his seniority occurred within three years after his lay-off. If he had had less than five years of employment before his lay-off, he would be entitled to reemployment if an opening for one with his seniority occurred within two years after his lay-off. The contract between the union and the employer contained a non-contributory pension plan, with normal retirement on pension at age 65, early retirement at 55 if the employee had had 15 years of service, and other types of pensions under specified conditions.

The contract also included hospital, medical and surgical insurance, life insurance and accidental death insurance to be paid for by the employer.

On September 16, 1957 the defendant gave written notice to the union that it would terminate the collective bargaining contract at its expiration date, November 30, 1957. After September 16 it began to reduce production at Elmhurst, and to remove its machinery and equipment from Elmhurst to a newly established plant at Bethlehem, Pennsylvania. The employment of four of the five plaintiffs was terminated on November 1, and that of the fifth one on November 18. The ages of the five plaintiffs, at the time of their discharge, ranged from 43 to 61 years, and their periods of employment with the defendant ranged from 10 to 25 years.

The defendant removed a considerable part of its machinery from its Elmhurst plant to the new Bethlehem plant, and manufactured there a number of the same products. The Bethlehem plant was more modern and efficient, [fol. 4] and apparently had a considerable number of new machines, in addition to the ones moved from Elmhurst. Some of the products formerly made at Elmhurst were, after the closing of that plant, made at the defendant's Louisville plant.

There was work at the Bethlehem plant similar to that done at Elmhurst by three of the plaintiffs. As to the other two plaintiffs, who were men, aged 43 and 49, their work at Elmhurst was to check merchandise that was loaded or unloaded from trucks leaving or entering that plant. At the Bethlehem plant such duties have been incorporated into other job classifications which specify the employee to load and unload the trucks and to operate an electric walking type lift truck to stack the merchandise in the storage area as well as to check the incoming and outgoing merchandise that the employee loads and unloads. This different Bethlehem work would not seem to have required any skill that could not have been acquired in a short time.

The defendant offered to give fair consideration to applications for employment at its Bethlehem plant, to its former employees at Elmhurst, only if they would come to Bethlehem and make application there on the same basis

as new applicants who might seek employment there. Two Elmhurst employees, not plaintiffs herein, made such applications, and their applications were accepted. Only one of them actually went to work. He has been considered as a new employee at Bethlehem, with no seniority carried over from Elmhurst.

The plaintiffs contend that they were, as beneficiaries of the contract between their union and the defendant, entitled to the jobs which were created by the opening of the plant at Bethlehem. They say that they were laid off because of the removal of the machinery and the cessation of operations at Elmhurst, and that as work was opened up at Bethlehem they were entitled, by reason of their seniority [fol. 5] and the contract provisions relating to it, to go to work at Bethlehem with the seniority which they had acquired at Elmhurst.

The defendant offers several defenses. We consider first the defense of res judicata. That defense was considered and rejected, first by Judge Dimock, on a motion by the defendant for summary judgment and again, after the defendant had filed its answer asserting res judicata as an affirmative defense, by Judge Palmieri, in his decision and opinion on the merits of the case.

Local 852, the plaintiffs' union, served on the defendant a notice of intention to arbitrate certain designated disputes, pursuant to the arbitration provision in the union's contract with the defendant. The defendant made a motion in the Supreme Court of New York to stay arbitration, on the ground that the disputes were not arbitrable under the arbitration provision of the contract. That provision said:

Any question, grievance or dispute arising out of and involving the interpretation and application of the specific terms of this Agreement \* \* \* shall, at the request of either party, be referred to the New York State Mediation Board for arbitration. (Emphasis supplied.)

The court granted the defendant's motion, on the ground that the subjects sought to be arbitrated were not covered

by the *specific terms* of the contract. The court's opinion<sup>1</sup> lays much emphasis on the word *specific* in the agreement to arbitrate and says that "no one is under a duty to resort to arbitration unless by clear language he has so agreed." The court concluded its opinion with this sentence:

[fol. 6] It follows from all the foregoing that Glidden's motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes.

The New York court's opinion as a whole, and its concluding paragraph seem to us to show that the court was deciding nothing more than that the arbitration provision, as narrowly written, did not confer jurisdiction upon an arbitration tribunal to adjudicate the disputes in question. If the court had decided, as the defendant claims, that the contract as a whole, in its circumstances, and including its fair implications, conferred no rights upon the union or the employees with regard to the asserted disputes, the court's concluding paragraph defies understanding.

The defendant also contends that because the collective bargaining agreement contained provisions for the arbitration of disputes, the plaintiffs are not entitled to individually enforce their rights under the agreement. The defendant relies heavily upon Parker v. Borock, 5 N. Y. 2d 156, 156 N. E. 2d 297 (1959), as support for its contention that the plaintiffs individually are not entitled to enforce the rights which they claim here. In the Parker case, the plaintiff had been discharged "for cause." He invoked the grievance procedure of the collective bargaining agreement between his union and employer. He was not reinstated, and the union refused his request to seek arbitration. He thereupon moved in the United States District Court to compel the employer to arbitrate his discharge. The motion was denied.

The plaintiff then sued in the New York state courts for money damages for breach of the collective agreement, asserting that the employer did not have "cause" to discharge

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<sup>1</sup> Matter of General Warehousemen's Union, 10 Misc. 2d 700, 172 N. Y. S. 2d 678 (1958).

him. The defendant moved for a stay pending arbitration, but its motion was denied on the ground that only the [fol. 7] employer or the union, and not an employee, could seek a submission to arbitration. The defendant then moved for summary judgment. The New York Supreme Court denied the motion, but the Appellate Division's reversal, granting the motion, was affirmed by the Court of Appeals.

The Court of Appeals said, 5 N. Y. 2d at p. 160, 156 N. E. 2d at p. 299, that "the employee is the direct beneficiary" of provisions in a collective agreement prohibiting discharge of an employee except for cause. The court held, however, that the plaintiff, who was also "bound by and limited to the provisions of the agreement," had "entrusted his rights to his union representative," who alone could have sought arbitration of the plaintiff's discharge. 5 N. Y. 2d at p. 161, 156 N. E. 2d at pp. 299-300. The court noted that the plaintiff's only remedy would be against the union for failing to fulfil its duties under the agreement.

The Parker case is, therefore, significantly different from the instant case. In Parker, the question which the plaintiff sought to litigate had been entrusted by him, under the collective agreement, to the arbitration process. That was the interpretation which the New York Court of Appeals placed upon the contract there before it. In the instant case, as we have seen, the Supreme Court of New York has held that the dispute with which this suit is concerned is *not* covered by the arbitration provision of the agreement.<sup>2</sup> The plaintiffs have not, therefore, entrusted to their union representatives the rights which they now seek to enforce.

As to the merits of the plaintiffs' claims, the defendant takes the bold position that the collective bargaining contract conferred upon the employees no rights which survived the contract. It says, at page 27 of its memorandum:

[fol. 8] Even if the Elmhurst operations had continued but the collective bargaining agreement had expired, the seniority status of plaintiffs would not have survived the termination of that agreement. For

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<sup>2</sup> Matter of General Warehousemen's Union, *supra*.

it is only by reason of existing provisions in the agreement that provisions relating to the seniority have any application. When such provisions no longer exist, seniority no longer exists.

The defendant may have assumed this bold and uncompromising position because it feels uneasy about Judge Palmieri's having based his decision solely upon the geographical shift of the plaintiff's factory operations. We discuss that problem later herein.

We think the defendant's language, quoted above, is not supportable. Suppose an employee had completed five years of service in October, 1957. Under the seniority provision of the collective bargaining agreement, he thinks that he has earned, and acquired, by continuous service, valuable insurance against unemployment; that by reason of having worked continuously for this company longer than many of his fellow workmen, he could not be laid off unless the lay-off cut deep into the working force; that even if he should be reached in a lay-off, he would be sure to be re-employed if at any time within three years after the lay-off his name should be reached on the seniority list, for re-employment. As we have seen, the defendant's position is that the employee had not acquired any such rights.

Rights embodied in a collective bargaining contract negotiated by a union "inure to the direct benefit of employees and may be the subject of a cause of action." *Parker v. Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297-298, citing *Barth v. Addie Co.*, 271 N. Y. 31, 2 N. E. 2d 34, and other New York cases. If one has in October a right to demand performance of the corresponding obligation at any relevant [fol. 9] time within a period of three years, it would be strange if the other contracting party could unilaterally terminate the right at the end of three weeks. Of course the employee owning the right, or his authorized union agent, could bargain away the employee's right. Nothing of that kind occurred in the instant case.

At the time the Elmhurst employees were discharged, those who had reached the age of 65 and had otherwise satisfied the conditions prescribed in the collective bargaining agreement for receiving retired pay, were placed on

the defendant's retired list and have been and are currently receiving their retired pay. Similarly, those who had reached the age of 55, or who had become permanently disabled in the service of the defendant, and had had 15 years of employment with the defendant, are receiving their retired pay. Those who had 15 years of service and had reached the age of 45 at the time of their discharge were advised by the defendant that they had vested rights to retirement benefits and would begin to receive payments when they reached the age of 65.

These rights to retired pay, though their realization will extend far into the future, and though they arise solely and only out of the terms of the union agreement with the defendant, have been treated as "vested" rights and are being voluntarily honored by the defendant. This was, we suppose, because the employees had earned these rights by compliance with the terms of the contract, and the fact that the contract was not renewed, and that other workmen in the future might not have the opportunity to earn similar rights, was irrelevant. We think the plaintiff employees had, by the same token, "earned" their valuable unemployment insurance, and that their rights in it were "vested" and could not be unilaterally annulled.

[fol. 10] We think, then, that if the plaintiff had continued to operate the Elmhurst plant, without a renewal of the union contract, or had reopened it after it had been closed for a time, the employees would have been entitled to reemployment, with seniority. This brings us to the issue which Judge Palmieri in the District Court, found to be the critical issue, i.e., whether the unit to which the employees' rights attached "extended beyond the Elmhurst plant." He held that the rights were not enforceable except in the Elmhurst plant, and therefore denied recovery. With deference, we disagree with this conclusion.

The union contract, in its preamble, recited that it was made by the defendant company

for and on behalf of its plant facilities located at  
Corona Avenue and 94th Street, Elmhurst, Long Island,  
New York.

If this narrow geographical description is treated as setting fixed boundaries upon the scope of the contract, difficulties immediately arise. If the plant moved from 94th Street to 93d Street in Elmhurst, an entire structure of valuable legal rights would tumble down. A fortiori if the plant moved to a site a few miles or a good many miles away, the consequence would be the same. But one would be obliged to wonder why so catastrophic a consequence should follow a mere change in physical location. And it would be hard to conjure up a reason why it should. Rather it would seem that the recital in the contract would be analogous to the *descriptio personae* familiar to the law in various situations.

A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it. Contracts must, in all fairness, be construed *ut res magis* [fol. 11] *valeat quam pereat*. If not, the reasonable expectations of the parties are sacrificed to sheer verbalism.

In the instant case the plant was, of course, not moved from 94th Street to 93d Street in Elmhurst, nor from Elmhurst to another town within commuting distance of the then residences of the employees. It was moved to a city in another state. That fact does not seem to us to be decisive. It would, of course, have confronted the employees with troublesome problems. They would have had to decide whether the advantages of continued employment with this employer, the right to which they had earned in Elmhurst, were sufficient to induce them to make so considerable a move. It is probable that many of them would not have made the move. Those to whom the defendant had offered employment in Bethlehem, who did not accept the offer, would have, in effect, resigned their seniority and the rights that accompanied continued employment.

We can see no expense or embarrassment to the defendant which would have resulted from its adopting the more rational, not to say humane, construction of its contract. The plaintiffs were, so far as appears, competent and satisfactory employees. They had long since completed the period of probation prescribed in the union contract. It would seem that they would have been at least as useful

employees as newly hired applicants. The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement there, at the time the plant was opened.

In the circumstances, no detriment to the defendant would have resulted from a recognition by the defendant of rights in its employees corresponding with their reasonable expectations. In that situation, a construction of the contract which would disappoint those expectations would be irrational and destructive.

[fol. 12] It follows from what we have said that the plaintiffs were entitled to be employed at the defendant's Bethlehem plant, with the seniority and reemployment rights which they had acquired at the Elmhurst plant. The refusal of the defendant to recognize that entitlement was a breach of contract, and the plaintiffs are entitled to recover the damages which that breach has caused them.

The plaintiffs allege in their complaint that they have been "deprived of employment by the defendant," as a result of the defendant's conduct recited above. That is an adequate allegation that they would have accepted employment at Bethlehem if it had been offered to them on the terms to which they were entitled. Proof of this allegation may well fall short of complete conviction, but the trier of fact will not penalize the plaintiffs on account of the uncertainty which has been caused by the defendant's conduct.

Whatever pension rights would have been earned by employment at Bethlehem, if it had been accepted, must be recognized by the defendant.

Since the case will be remanded, we leave to the District Court consideration of the right of recovery, if any, in connection with the welfare plan and the group insurance plan which were included in the union agreement.

It appears that the named plaintiff Mary A. Hackett is deceased, and that no motion for substitution has been made. Unless a proper motion is made, the District Court will dismiss the complaint as to that plaintiff.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

[fol. 13] LUMBARO, Chief Judge (Dissenting):

For the reasons persuasively set forth in Judge Palmieri's careful and thorough opinion, reported at 185 F. Supp. 441, I would affirm.

It is immaterial to the resolution of the question before us that the employment of competent and satisfactory employees is suddenly terminated, or even that the employer has acted ungenerously, as indeed it has. We are called upon to construe the contract upon which the parties agreed and not to substitute for it one with more humane or less destructive terms.

The parties have assumed here that the Supreme Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957), did not sub silentio overrule the distinction between "individual" and "union" rights announced in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Co.*, 348 U. S. 437, 461 (1955). Although the survival of this distinction gives the employees standing personally to assert "individual" rights arising out of a collective-bargaining agreement, *Local Lodge 2040 v. Servel, Inc.*, 268 F. 2d 692, 696 (7th Cir.), cert. den. 361 U. S. 884 (1959), the contract should be construed in light of federal substantive law pursuant to §301 of the Labor Management Relations Act, 29 U. S. C. §185.

The federal cases hold that seniority is not inherent in the employment relationship but arises out of the contract. E.g., *Elder v. New York Central R.R.*, 152 F. 2d 361, 364 (6th Cir. 1945); see Note, 54 Nw. U. L. Rev. 646, 649-50 (1959). If rights are to persist beyond the term of the collective-bargaining agreement, the agreement must so provide or be susceptible of such construction. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

[fol. 14] The agreement we are here called upon to interpret did not expressly provide for any retention of seniority rights beyond the termination of the collective-bargaining agreement. The employees claim, however, that by agreeing to rehire on the basis of seniority for two or three years after layoff, the employer undertook not only

to retain seniority rights after the expiration of the agreement but to extend existing seniority privileges to any other location to which the work then done at Elmhurst would be assigned. Relocation of an employer's plant does not, of course, automatically terminate all rights under a collective-bargaining agreement; whether such rights continue depends on the terms of the contract. See Metal Polishers Local 44 v. Viking Equipment Co., 278 F. 2d 142 (3d Cir. 1960). The issue here is whether this collective-bargaining agreement gave the employees the right to "follow the work" to the new site. I would hold that it did not.

The closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly done in good faith and were not wholly unforeseeable. As Judge Palmieri points out, it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely unions are now fully of age and are able to protect themselves and their members at the bargaining table. The consequences of dismissing the plaintiffs' case might indeed be unfortunate and even "catastrophic" from their point of view, but it is hardly "irrational and destructive" for a court to leave the parties as they are if they have never seen fit to provide otherwise.

[fol. 15]

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. J. Warren Madden, Judge, Court of Claims, Hon. Sterry R. Waterman, Circuit Judge.

---

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER, Plaintiffs-Appellants,

v.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,  
a Foreign Corporation, Defendant-Appellee.

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Appeal from the United States District Court for the Southern District of New York.

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JUDGMENT—March 28, 1961

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings not inconsistent with the opinion of this court; with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 16]

**UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT**

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. J. Warren Madden, Judge, Court of Claims, Hon. Sterry R. Waterman, Circuit Judge.

[Title omitted]

**ORDER DENYING PETITION FOR REHEARING—April 24, 1961**

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 17]

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

[Title omitted]

**ORDER DENYING PETITION FOR REHEARING—April 24, 1961**

White & Case, New York, N. Y., for defendant-appellee.

Petition denied.

J. E. L., J. W. M., S. R. W., U.S.J.J.

**ORDER DENYING PETITION FOR REHEARING IN BANC  
—April 24, 1961**

All of the active judges concurring, the petition for rehearing in banc is denied.

J. Edward Lumbard, Chief Judge.

24 April 1961

[fol. 18]

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC  
—April 24, 1961

A petition for a rehearing in banc having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 19] Clerk's Certificate to foregoing transcript  
(omitted in printing).

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[fol. 20]

SUPREME COURT OF THE UNITED STATES  
No. 242—October Term, 1961.

[Title omitted]

ORDER ALLOWING CERTIORARI—October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to question (d) presented by the petition which reads as follows:

“(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?”

In all other respects the petition for writ of certiorari is denied. The case is transferred to the summary calendar and set for argument immediately following No. 341, Misc.

Pursuant to 28 U.S.C. 2403, the Court hereby certifies to the Attorney General that there is drawn in question in this case the constitutionality of the Act of July 28, 1953, 67 Stat. 226 (28 U.S.C. 171).

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 242

FILED  
JUL 21 1961

JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

•••

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, a Foreign Corporation,

*Petitioner,*  
*against*

OLGA ZDANOK, JOHN ZACHARCYK, MARY A.  
HACKETT, QUITMAN WILLIAMS and  
MARCELLE KREISCHER,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1961.

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**Docket No.**

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**THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, a Foreign Corporation,**

Petitioner,

*against*

**OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS and MARCELLE KREISCHER,**  
Respondents.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT.**

To the Honorable Earl Warren, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, The Glidden Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgment entered herein on March 28, 1961.

**Opinions Below.**

The opinion and judgment of the United States District Court, Southern District of New York, in favor of petitioner, is reported at 185 F. Supp. 441 and at page A-1, appendix A. The opinion of Honorable J. Warren Madden of the United States Court of Claims (sitting by designation) concurred in by Honorable Sterry R. Waterman, in

the Court of Appeals for the Second Circuit, reversing the judgment of the District Court and remanding the case for further proceedings not inconsistent therewith, and the dissenting opinion of Honorable J. Edward Lumbard, Chief Judge, are reported at 288 F. 2d 99, 105 and pages A-18 and A-29, appendix A.

### **Jurisdiction.**

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on March 28, 1961 (page A-31, appendix A). A timely petition for rehearing, filed on April 12, 1961, was denied on April 24, 1961 (Vol. 2, page 144a of certified record).

The statutory provision conferring jurisdiction on this court is found at 62 Stat. 928; Title 28 U. S. C. §1254(1).

### **Questions Presented.**

(a) Are seniority rights in a given bargaining unit, arising under a collective bargaining agreement applicable to a specific plant which has been closed, transferable to another plant in the absence of language in the agreement expressing an intent that they should be so transferable?

(b) Do seniority rights and obligations under a collective bargaining agreement between an employer and a collective bargaining agent of its employees continue to exist after the employment has been duly terminated in good faith?

(c) Do seniority rights and obligations under a collective bargaining agreement between an employer and a collective bargaining agent of its employees continue to exist after that agreement has been duly terminated in good faith?

(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?

## **Constitutional Provisions and Statutes Involved.**

Constitution of the United States, Article I, Sections 1 and 8; Article III, are set forth at pages B-1 to B-4 of appendix B to this petition.

49 Stat. 452; 61 Stat. 140; 65 Stat. 601; 73 Stat. 525, 542, 545; Title 29 U. S. C. §158 (a), (1), (5); (b), (1), (3), are set forth at page B-5 of appendix B to this petition.

61 Stat. 140; Title 29 U. S. C. §157 is set forth at page B-4 of appendix B to this petition.

61 Stat. 156; Title 29 U. S. C. §185 (a) is set forth at page B-5 of appendix B to this petition.

67 Stat. 226, Title 28 U. S. C. §171 is set forth at page B-4 of appendix B to this petition.

## **Statement Under Rule 33(2)(b) of the Rules of the Supreme Court of the United States.**

Since the proceeding draws into question the constitutionality of the Act of July 28, 1953, 67 Stat. 226, Title 28 U. S. C. §171, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that Title 28 U. S. C. §2403 may be applicable.

No court of the United States as defined by Title 28 U. S. C. §451 has, pursuant to Title 28 U. S. C. §2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

## **Statement of Case.**

Respondents commenced this action in the Supreme Court of the State of New York. The action was removed to the United States District Court for the Southern Dis-

trict of New York which had jurisdiction since the requisite diversity of citizenship among the parties existed and the amount in controversy exceeded \$10,000. Each respondent claimed damages for an alleged breach of the collective bargaining agreement between petitioner and the collective bargaining agent of respondents and numerous other former employees of petitioner who are plaintiffs in an action pending in the Supreme Court of New York, New York County. Respondents alleged that petitioner deprived them of property rights accruing to them under the agreement such as benefits under a Welfare Plan, a Pension Plan and Group Insurance Plan (not provided for in the agreement) to which they might have been entitled if *they had been continued in the employment of petitioner after the termination of their employment, and after the termination of the collective bargaining agreement* in accordance with its terms, and *after the closing of the plant where respondents were formerly employed and to which the agreement specifically applied* (Vol. I, page 37a *et seq.* of certified record).

The collective bargaining agreement here (Vol. I, page 56a of certified record) covered the period from December 1, 1955 to November 30, 1957. Like earlier agreements, it would be automatically renewed from year to year unless terminated by either party by sixty days notice which in fact was given by petitioner (Vol. I, page 80a of certified record). It provided with respect to seniority that employees with specified years of continuous employment were entitled to be recalled from lay off for specific periods of time but contained no provision for recall after termination of employment or the agreement (Vol. I, page 68a and 69a of certified record).

Shortly prior to November 30, 1957, the date of the closing of petitioner's plant at Elmhurst, Long Island, New

York, where these former employees were employed, petitioner opened a plant in Bethlehem, Pennsylvania which utilized new and improved machinery, better production line layouts and modern production line methods in the manufacture of many of the same products formerly manufactured at Elmhurst (Vol. I, page 81a of certified record). On that date and at times immediately prior thereto, respondents' employment by petitioner was terminated by petitioner because of the anticipated closing and the actual closing of its Elmhurst plant. Respondents had been told of the closing in May 1957, and their collective bargaining agent was told of it in September 1957 when it was duly notified that the collective bargaining agreement would terminate on its date of expiration, November 30, 1957 (Vol. I, page 80a of certified record). The actual closing of the plant occurred on the same date as the date of the termination of the collective bargaining agreement in accordance with its terms.

No claim has been made by respondents, nor by their collective bargaining agent, of any improper termination of employment. Respondents merely claim that they should have been continued in employment with petitioner at its plant in Bethlehem, Pennsylvania, with seniority rights based upon length of service at Elmhurst and that the denial thereof constituted a breach of the agreement.<sup>1</sup>

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<sup>1</sup> For the petitioner to have agreed to such seniority at Bethlehem, might well have constituted an unfair labor practice. Title 29 U. S. C. §157, 158(a), (1), (5), and 158(b), (1), (3), (Appendix B, pages B-4 and B-5). Employees at Bethlehem might have chosen, as in fact they did, a different collective bargaining agent which had the right to bargain with respect to working conditions including seniority. A seniority arrangement agreed upon in advance with the former Elmhurst employees could not be properly or legally imposed upon the Bethlehem unit where the collective bargaining agent of petitioner's former employees " \* \* \* " would not have a leg to stand on, " \* \* \*" as conceded by their counsel at page 53 of transcript of trial.

The trial was held before Honorable Edmund L. Palmieri on a statement of facts given by petitioner in lieu of the taking of its deposition which was the only evidence at the trial except for the text of three earlier collective bargaining agreements introduced by respondents. A jury trial was waived except with respect to the question of damages if any, in the event liability on the part of petitioner was established. Judge Palmieri ordered judgment for petitioner (appendix A, page A-17). He held that it was not necessary to decide whether the seniority rights survived the termination of employment of respondents or the proper termination of the collective bargaining agreement. These seniority rights, he said, arose under a collective bargaining agreement expressly limited to employment at petitioner's Elmhurst, Long Island plant. "In order to recover," the court's opinion states, "plaintiffs must also show that the governing seniority system gave them the right to 'follow their work' to the new plant." He noted that the Elmhurst plant was closed in good faith as petitioner had a right to do which fact was not suggested as a breach of the agreement or a violation of law. See, *Matter of Arbitration between General Warehousemen's Union Local 852 etc. and the Glidden Company*, 10 Misc. 2d (NY) 700; 172 N. Y. S. 2d 678 (1958), where Mr. Justice Kusnetz in staying arbitration between petitioner and respondents' collective bargaining agent ruled that petitioner had complied with every term of its agreement relating to the welfare, pension and group insurance plans and had not violated any specific term of the agreement, although the identical claims made here were made there.<sup>2</sup>

Judge Palmieri pointed out that there was nothing in the record to warrant the conclusion urged by respondents

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<sup>2</sup> The Court of Appeals rejected petitioner's defense of *res judicata*. Appendix A at pages A-21 to A-23.

as to the unlimited geographic scope of their seniority rights and referred to wide variations existing in seniority systems used in industry, and with respect to the unit to which seniority rights applied noted that an entire multi-plant company or district may be made subject to the same system, or that the system may be limited to a particular plant, department, or occupation. He referred to the numerous types of units which had been agreed upon in collective bargaining and concluded:

\*\*\* \* it would be unreasonable to expect a court to imply a general understanding between the parties as to the extent of the seniority unit when no evidence has been offered as to negotiations on the subject or an established course of practice on the part of the employer.

\* \* \* \* \*

In sum, under the circumstances presented in this case, where no relevant limitation on the employer's freedom of action is found in the agreement or the prior conduct of the parties, no policy of New York law or our national labor law requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant" (Appendix A, pp. A-15, A-16).

Judge Madden in the Court of Appeals held that under the collective bargaining agreement, respondents had earned vested seniority rights which endured and were enforceable after the termination in good faith of the agreement under which provision was made therefor and after the termination in good faith of the employment of respondents to which such seniority rights attached. He further held that such rights were applicable to petitioner's plant in Bethlehem, Pa. where respondents were "entitled to be employed \*\*\* with the seniority and re-employments rights which

they had acquired at the Elmhurst plant." Chief Judge Lumbard dissented in an opinion stating that Judge Palmieri's determination was thorough and correct and that the agreement did not provide for the retention of seniority rights beyond the termination of the collective bargaining agreement. He stated (appendix A, page A-30):

"The closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly *done in good faith* [emphasis added] and were not wholly unforeseeable. As Judge Palmieri pointed out it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely unions are now fully of age and are able to protect themselves and their members at the bargaining table. \* \* \* It is hardly 'so irrational and destructive' for a court to leave the parties as they are if they had never seen fit to provide otherwise."

*Respondents and other former employees of petitioner were not laid off, as Judge Madden erroneously assumed in order to apply the seniority provisions of the terminated agreement. Their employment in fact was permanently terminated* (Vol. I, pages 89a and 90a of certified record).

Layoff refers to "a temporary or indefinite separation of an employee from his work, as distinguished from a permanent termination of employment, \* \* \*." Labor Law Guide, §2220, Commerce Clearing House Inc.; *A. C. F. Industries, Inc. v. Industrial Commission*, 320 S. W. 2d 484, 491 (Sup. Ct. of Missouri—en banc—1959).

"Seniority may be defined as a right or preference in employment which is earned by and based upon length of service. That right of preference is not absolute, however, and may be limited by many factors which determine the value of seniority to a particular worker. An employee

may exercise his seniority rights only while working for the same employer, within a particular department or occupational group, or within an agreed seniority district which may vary in size from a shop or office in one plant to several or all the plants of a given company, *depending upon the agreement*'''. (emphasis added.) Mitchem, Seniority Clauses in Collective Bargaining Agreements, 21 Rocky Mt. L. Rev. page 156, at page 157 (1949).

### **Reasons for Allowance of the Writ.**

The Court of Appeals has held in effect that an employee covered by a collective bargaining agreement providing for seniority rights, has a right to be recalled to employment wherever the employer carries on a similar manufacturing process (despite the application of the agreement to a specific plant), after his employment has terminated, and after the termination of the agreement under which provision is made therefor, in accordance with its terms.

This petition for a writ of certiorari should be granted because:

1. Rights and obligations under collective bargaining agreements involve federal substantive law and are fashioned from the policy of the national labor laws.
2. The decision of the Court of Appeals is in conflict with decisions of the United States Courts of Appeals for the Fifth, Sixth and Seventh Circuits, each of which has held that in the absence of express language to the contrary, seniority rights endure only during the life of the collective bargaining agreement providing therefor, or only during the period of the existence of the relationship of employer and employee.
3. The decision of the Court of Appeals has determined questions of widespread importance involving

federal substantive law which have not been, but should be, settled by this court.

4. Participation by a Court of Claims judge vitiates the judgment of the Court of Appeals.

### **Argument in Support of Reasons.**

#### **1.**

*The rights and obligations in collective bargaining agreements involve federal substantive law.*

In *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957), in a suit by a union to compel arbitration of a grievance under §301 of the LMRA, 61 Stat. 156; Title 29 U. S. C. §185, it was stated by Mr. Justice Douglas at page 451 that that section

“• • • authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements • • \*. Perhaps the leading decision representing that point of view is one rendered by Judge Wyzanski in *Textile Workers Union v. American Thread* (D. C. Mass.) 113 F. Supp. 137. That is our construction of §301(a). [§185 of 29 U. S. C.] • • •.”

At page 455 he stated:

“§302 of the House Bill, the substantial equivalent of the present §301 was being described by Mr. Hartley, the sponsor of the bill in the House:

“Mr. Barden. Mr. Chairman, I take this time for the purpose of asking the Chairman a question, and in asking the question I want it understood that it is intended to make a part of the record that may hereafter be referred to as the history of the legislation.

“It is my understanding that §302, the section dealing with equal responsibility under collective bargaining contracts, in strike actions and proceed-

ings in district courts, contemplate not only the ordinary law suits for damages, but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act, in order to secure declarations from the Court of legal rights under the contract.

"Mr. Hartley. The interpretation the gentleman has just given of that section is absolutely correct. 93 Cong. Rec. 3656, 3657."

and at page 456

"The question then is, what is the substantive law to be applied in suits under §301(a)? We conclude that the substantive law to apply in suits under §301(a) is federal law which the courts must fashion from the policy of our national labor laws."<sup>3</sup>

While this court, in *Westinghouse Employees v. Westinghouse Electric Corp.*, 348 U. S. 437 (1954) held that federal courts do not have jurisdiction under §301 where the union sued to recover payments alleged to be owing to the individual employees, it seems that federal substantive law should apply to such suits by individual employees. There is no question that an employee wrongfully deprived of rights accruing to him individually, during the existence of the term of a collective bargaining agreement, may enforce them.<sup>4</sup>

Seniority rights do not merely involve an individual employee's right, but as stated by Judge Madden, in the

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<sup>3</sup> Numerous decisions are listed by Mr. Justice Douglas in footnote 2 to his opinion to the effect that §301(a) is more than jurisdictional and creates substantive rights authorizing federal courts to fashion a body of federal labor law.

<sup>4</sup> Rights of Individual Employee to Enforce Collective Bargaining Agreement against Employer, 18 ALR 2d 353, 366 (1950).

majority opinion here (appendix A, page A-25), a collective bargaining agent may bargain away such rights. A collective bargaining agent may rearrange the order of seniority or abolish the entire order. *Ford Motor Co. v. Huffman*, 345 U. S. 330, 339 (1953). A collective bargaining agent has interests “\* \* \* which embrace the system of seniority rights.” *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 537 U. S. 521, 527 (1949). A collective bargaining agent therefore has the right to maintain an action with respect to seniority rights under §301 of the LMRA (61 Stat. 156; Title 29 U. S. C. §185) in the federal courts where Congress intended the courts to fashion a federal law from the policy of the national labor laws.

Collective bargaining agents having such extensive rights and interests in seniority provisions, could therefore enforce such rights in the federal courts under the federal policy referred to without coming within the prohibition laid down in *Westinghouse*.

In order to fashion a comprehensive pattern of rights, obligations and remedies under collective bargaining agreements, federal law should be looked to for the determination of the rights and obligations under collective bargaining agreements relating to seniority, even when individual employees seek to enforce them. *Ingraham Co. v. Local 260 International Union of Electrical Workers, etc.*, 171 F. Supp. 103 (D. C. Conn. 1959); *New Bedford Defense Products Division, etc. v. Local 1113 of the International Union, etc.*, 160 F. Supp. 103 (D. C. Mass. 1958); aff'd 258 F. 2d 522 (C. A. 1st Cir., 1958).

In *Ingraham* Judge Anderson stated:

“If in dealing with cases of this kind, it were to be held that state and federal jurisdiction overlapped and that application could be made to either tribunal to apply its own law, an unnecessary jumble would

result. Moreover, a controversy might well be determined by the relative fleetness of foot of the party running to the county courthouse for the application of state law as against the alacrity of the other party seeking to invoke federal law in the federal court."

As emphasized by Professor Archibald Cox in Federalism in the Law of Labor Relations, 67 Har. L. Rev. page 1297 (1954), at page 1339:

"It would create hopeless confusion to have one rule applicable to suits by a labor organization and another to suits by individuals. Uniformity could be achieved under a body of federal substantive law only by holding that the rules of decision developed by the federal courts were binding in state tribunals."<sup>5</sup>

In this case Chief Judge Lumbard concluded:

"\* \* \* the contract should be construed in light of federal substantive law \* \* \*." (Appendix A, page A-29)

The survival of seniority rights and obligations *after the termination of employment or after the termination of the collective bargaining agreement* surely should be determined by the same law regardless of whether their enforcement is sought by individuals under diversity jurisdiction or by the collective bargaining agent under §301, and regardless of where their enforcement is sought.

<sup>5</sup> *Fay v. Amer. Cystoscope Makers*, 98 F. Supp. 278 (D. C. S.D.N.Y., 1951); *Swift & Co. v. United Packing House Workers*, 177 F. Supp. 511 (D. C. Colo., 1959); Notes on Recent Cases, Harvard L. Rev. Vol. 71, pp. 1169, 1170, 1171, 1172 (1958).

*The decision of the Court of Appeals is in conflict with decisions of the United States Courts of Appeals in the Fifth, Sixth and Seventh Circuits, each of which has held that in the absence of express language to the contrary, seniority rights endure only during the life of the collective bargaining agreement by virtue of which they exist, or only during the period of the existence of the relationship of employer and employee.*

In *Local Lodge 2040 International Association of Machinists v. Servel*, 268 F. 2d 692 (C. A., 7th Cir., 1959), cert. den. 361 U. S. 884, Judge Hastings concluded at page 698:

“Contrary to appellants’ contention, we find nothing in the agreement providing for a permanent lay-off status to these employees or giving vested rights to seniority for two years following their layoff. Seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence \* \* \*. ”<sup>6</sup>

In *System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co.*, 119 F. 2d 509 (C. A., 5th Cir., 1941) Judge Hutcheson stated with reference to seniority rights in a collective bargaining agreement, at page 515:

“The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term.”

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<sup>6</sup> “From the very nature of seniority (which has been defined as a right or preference in employment) it is obvious that when the employment relation has definitely ceased to exist as a result of either a discharge or voluntary quit, all seniority rights are terminated.” Mitchem, *Seniority Clauses in Collective Bargaining Agreements*, 21 Rocky Mt. L. Rev. page 156, at page 181 (1949).

In *Elder v. N. Y. Central R. R. Co.*, 152 F. 2d 361 (C. A., 6th Cir., 1945), Judge Martin stated

"\* \* \* the authorities are uniform to the effect that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions."

*Elder* held that seniority rights may be changed or abolished by subsequent agreement made by a collective bargaining agent representing employees and the employer.

*Elder* has been followed in numerous cases holding that neither the collective bargaining agent nor the employer is liable to an employee for so altering or eliminating his seniority status.<sup>7</sup>

Whatever variations in facts may exist in these cases from the facts in the instant case, the rationale in each case is identical.

As stated by Chief Judge Lumbard in his dissent (appendix A, pages A-29 and A-30):

"The federal cases hold that seniority is not inherent in the employment relationship but arises out of the contract. E.g. *Elder v. N. Y. Central R. R.*, 152 F. 2d 361, 364 (6th Cir. 1945), See Note 54 Nw. U. L. Rev. 646, 649-50 (1959). If rights are to persist

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<sup>7</sup> *Fagan v. Penn. R. R. Co.*, 173 F. Supp. 465 (D. C. M. D. Penn., 1959); *McMullans v. Kansas Okla. & Gulf Ry. Co.*, 229 F. 2d 50 (C. A., 10th Cir., 1956); *Pellicer v. Brotherhood of Ry. & S.S. Clerks, etc.*, 118 F. Supp. 254, (D. C. S. D. Fla., 1954) aff'd. 217 F. 2d 205, (C. A., 5th Cir., 1954) cert. denied 349 U. S. 912 (1955); *Goodin v. Clinchfield R. R. Co.*, 125 F. Supp. 441, 448, (D. C. E. D. Tenn., 1955) aff'd. 229 F. 2d 578 (C. A., 6th Cir., 1956); *Napier v. System Federation No. 91*, 127 F. Supp. 874 (D. C. W. D. Ken., 1955); *Walker v. Penn-Reading Seashore Lines*, 142 N. J. Eq. 588, 61 A. 2d 453 (N. J. 1948); *Lamon v. Ga. S. & Fla. Ry. Co.*, 212 Ga. 63, 90 S. E. 2d 658 (Ga., 1955) and see *Construction and Application of Seniority Provisions in Labor Relations Agreements*, 174 ALR 573 (1948).

beyond the term of the collective-bargaining agreement, the agreement must so provide or be susceptible of such construction. See *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

"The agreement we are here called upon to interpret did not expressly provide for any retention of seniority rights beyond the termination of the collective bargaining agreement. \* \* \*

"*The closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly done in good faith and were not wholly unforeseeable.* [emphasis added] As Judge Palmieri points out, it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely, unions are now fully of age and are able to protect themselves and their members at the bargaining table."

The conflict between the Second Circuit on the one hand and the Fifth, Sixth and Seventh Circuits on the other, should be resolved by this court in the fashioning of a substantive federal law in an important area of the federal labor law.

### 3.

*The decision of the Court of Appeals has determined questions of widespread importance involving federal substantive law which have not been, but should be, settled by this court.*

This Court has never passed on whether seniority rights and obligations should survive the termination of the collective bargaining agreement under which provision is made therefor, or should survive the termination of the employment relationship to which they apply. Compare, *Trailmobile v. Whirls*, 331 U. S. 40, 53, Note 21 (1946);

dissenting opinion by Mr. Justice Whittaker in *United Steel Workers v. Enterprise Corp.*, 363 U. S. 593, 601 (1960).

Under the provisions of the collective bargaining agreement relating to seniority Respondents and other former employees of petitioner at its Elmhurst plant had rights to be recalled to work only so long as the employer-employee relationship existed and only so long as the collective bargaining agreement existed. But here the relationship of employer-employee had been terminated and the collective bargaining agreement had been terminated pursuant to its terms. No rights had accrued to respondents and other former employees of petitioner during their employment or during the existence of the collective bargaining agreement to be recalled in the event work was available. The agreement which expired by its terms did not provide that respondents and other former employees continued to be afforded rights *in futuro* as though the employment relationship continued or as though the collective bargaining agreement continued.

Provisions similar, if not identical, to the provisions contained in the collective bargaining agreement here, are contained in practically all collective bargaining agreements in industry. The interpretation of these provisions by the Court of Appeals has far reaching consequences contrary to what has been known in the experience of management and labor with respect to such seniority rights, both factually and legally.<sup>8</sup>

In *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953) this court stated at page 333 that it granted certiorari

“ \* \* \* because of the widespread use of contractual provisions comparable to those before us and because

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<sup>8</sup> See, *Oddie et al. v. Ross Gear and Tool Company Inc.*, U. S. D. C. E. D. Mich., S. D., Civ. No. 21350—July 5, 1961; The New York Times, Vol. CX, No. 37,784, page 30, col. 1, July 6, 1961.

of the general importance of the issue in relation to collective bargaining."

The novel interpretation by the Court of Appeals of petitioner's collective bargaining agreement with respondents' agent will have far-reaching repercussions in the field of labor-management relations. Moreover, the interpretation is contrary to judicial precedents which have been accepted by both management and labor for many years. Numerous collective bargaining agreements have been made and are being acted on in good faith in line with these precedents. The interpretation of the Court of Appeals may well lead to drastic upheaval in the labor relations field.

Plant modernization and relocation brought on by rapid economic and technological changes occur frequently in the present industrial growth of the country. It is of the utmost importance to settle the rights of employers, unions and employees involved in or committed to collective bargaining agreements which may now or hereafter contain similar provisions relating to seniority rights, and restricted to specific plants.

#### 4.

*Participation by a Court of Claims judge vitiates the judgment of the Court of Appeals.*

The judgment of the Court of Appeals (Appendix A, p. A-31) was made upon an opinion written by Honorable J. Warren Madden, concurred in by Honorable Sterry R. Waterman, with a dissent by Honorable J. Edward Lumbard, Chief Judge.

Judge Madden had been designated to sit as a member of the United States Court of Appeals for the Second Circuit. He was at that time a member of the United States Court of Claims. He was sworn in as a judge of that court

on January 8, 1941 after appointment by the President of the United States with the concurrence of the Senate.

The United States Court of Claims is a legislative court and not a constitutional court. *Ex Parte Bakelite Corp'n*, 279 U. S. 438 (1929); *Williams v. U. S.*, 289 U. S. 553 (1933).

The Act of July 28, 1953, 67 Stat. 226, Title 28, USC §171 enacted some thirteen years after the appointment of Judge Madden by the President and the concurrence of the Senate, attempted unconstitutionally to repudiate the *Williams* classification that the Court of Claims was a legislative and not a constitutional court. Article III of the Constitution of the United States of America.

The judgment of the Court of Appeals therefore, stands with one judge of that court voting to reverse the judgment of the lower court dismissing the complaint, and one judge, the Chief Judge, dissenting and voting to affirm the dismissal of the complaint.

Judge Madden's participation in the hearing and determination of the appeal and the making of the judgment vitiated it.

This Court has never passed upon this question. *Lurk v. U. S.* (No. 669) decided by this Court May 29, 1961, with dissents by Mr. Justice Frankfurter, Mr. Justice Harlan and Mr. Justice Stewart. 6 L. ed. 2d 845. (not officially reported.)

**Conclusion.**

For the foregoing reasons this petition for writ of certiorari should be granted.

Dated July 20, 1961.

Respectfully submitted,

CHESTER BORDEAU,  
Counsel for Petitioner,  
14 Wall Street,  
New York 5, N. Y.

CHARLES C. HUMPSTONE,  
WHITE & CASE,  
Of Counsel.

**APPENDIX A.**

**Opinion and Judgment of the District Court for the  
Southern District of New York.**

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

**OLGA ZDANOK, JOHN ZACHARCYK, MARY  
A. HACKETT, QUITMAN WILLIAMS AND  
MARCELLE KREISCHER,**

Plaintiffs,  
*against*

**THE GLIDDEN COMPANY, DURKEE  
FAMOUS FOODS DIVISION, a foreign  
corporation,**

Defendant.

Civil 135-16.

**Appearances:**

**SAHN, SHAPIRO & EPSTEIN, Esqs., Attorneys for Plain-  
tiffs, 350 Fifth Avenue, New York 1, N. Y., MORRIS  
SHAPIRO and HARRY KATZ, Esqs., of Counsel.**

**WHITE & CASE, Esqs., Attorneys for Defendant, 14 Wall  
Street, New York 5, N. Y., CHESTER BORDEAU, Esq.,  
of Counsel.**

**PALMIERI, J.**

This case involves a dispute between a corporate employer and a group of employees concerning the seniority provisions of an expired collective bargaining agreement.<sup>1</sup>

<sup>1</sup> At the hearing on May 23, 1960, the parties stipulated in the record that each waived jury trial with respect to the issue of defendant's liability. It was further stipulated that if the court should determine that defendant is not liable to plaintiffs, the court would thereupon order dismissal of the complaint; and if the court should hold that defendant is liable to plaintiffs, a jury would be empanelled to determine the issue of damages.

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Plaintiffs, former employees of the defendant at its Elmhurst, New York plant, commenced this action in 1958 in the Supreme Court of the State of New York, County of New York, seeking to recover damages for defendant's alleged breach of its contract with General Warehousemen's Union, Local 852 of the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen, a labor union of which the plaintiffs are members. Defendant is an Ohio corporation authorized to do business in New York; plaintiffs are New York residents.

On defendant's petition setting forth the diverse citizenship of the parties and the value of the matter in controversy, the action was removed to this court. 28 U. S. C. §§1332, 1441(a). Jurisdiction here is based solely upon diversity of citizenship. The union is not a party and the court's power to proceed under §301 of the Labor-Management Relations Act of 1947, 29 U. S. C. §185, has not been invoked. In urging their respective contentions, the parties have apparently assumed that the substantive law to be applied is that of New York. See *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U. S. 437, 460 (1954). With respect to the legal issue raised by the complaint, however, the court has examined both New York law and the policy of our national labor laws, see *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957), and has been unable to detect any differences which might bear upon the resolution of this controversy. See *Local Lodge 2040 v. Servel, Inc.*, 268 F. 2d 692 (7th Cir.), cert. denied, 361 U. S. 884 (1959).

**STATEMENT OF FACTS<sup>2</sup>.**

From 1929 until November 30, 1957, defendant operated a plant at Elmhurst where it engaged, among other things,

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<sup>2</sup> Pursuant to a stipulation between the parties, the defendant submitted a Statement of Facts in lieu of the taking of its deposition. At the hearing, plaintiffs' counsel introduced in evidence Exhibits annexed to defendant's Statement and read into the record

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in the manufacture of coconut products, spices and condiments. Defendant and Local 852 first entered into a collective bargaining agreement on January 6, 1950, effective December 1, 1949, and expiring November 30, 1951. Thereafter, agreements were re-entered at two-year intervals. The last of these successive two-year agreements is dated March 13, 1956 and embraced the period from December 1, 1955 to November 30, 1957. By its terms, the agreement would be automatically renewed unless either party gave sixty days' notice of termination. Such notice was given by defendant on September 16, 1957 and the agreement was terminated on November 30, 1957.<sup>3</sup>

The defendant terminated the collective bargaining agreement pursuant to the decision of its Board of Directors to discontinue operations at the Elmhurst plant and to establish a new plant at Bethlehem, Pennsylvania. Defendant leased the Bethlehem plant on May 6, 1957 and, on May 16, 1957, Elmhurst employees were notified that operations would be discontinued in several months. In October, November and December of 1957, defendant removed some of the Elmhurst machinery and equipment for relocation at the Bethlehem plant.<sup>4</sup> Additional machinery and equip-

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considerable portions of the Statement itself. Plaintiffs offered no other evidence. Defendant then offered the remaining portions of the Statement and plaintiffs were given leave to indicate any parts claimed to be irrelevant or incompetent. The facts summarized herein have not been disputed by plaintiffs.

<sup>3</sup> All of the plaintiffs commenced employment at the Elmhurst plant prior to December 1, 1949, the effective date of the first collective bargaining agreement. Plaintiff Zacharczyk was laid off on November 18, 1957; the other plaintiffs were laid off on November 1, 1957.

<sup>4</sup> Approximately 75% of the machinery previously used by defendant in its coconut processing and packaging operations at its Elmhurst, Long Island, plant is presently being used by defendant in its coconut processing and packaging operations at its plant in Bethlehem, Pennsylvania.

Approximately 25% of the machinery previously used by defendant in its condiment grinding, filling and packaging operations (including spices) at its Elmhurst, Long Island, plant is presently

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ment were installed at Bethlehem and changes in manufacturing procedures were effected for the purpose of increasing production.

Under the agreement which was terminated on November 30, 1957, Elmhurst employees were entitled to seniority rights and certain fringe benefits. Defendant did not offer the plaintiffs continued employment at its Bethlehem plant with retention of seniority rights acquired at Elmhurst; it did offer to receive applications at the Bethlehem plant from former Elmhurst employees and to give Elmhurst applicants fair consideration along with all other applicants. Defendant did not give Elmhurst employees the opportunity to submit at the Elmhurst plant applications for Bethlehem employment. None of the plaintiffs filed applications for positions at the Bethlehem plant.<sup>5</sup> However, applications were received from two former Elmhurst employees who are not parties to this action and offers of employment were made to both. One accepted and is currently employed at the Bethlehem plant. He has received no credit for seniority accrued while employed by defendant at its plant in Elmhurst.

**THE ALLEGED BREACH OF CONTRACT.**

On these agreed facts, plaintiffs have raised a narrow and sharply defined legal issue. It is conceded that the collective bargaining agreement governing employment relationships at the Elmhurst plant was terminated on November 30, 1957 and that, in effecting the termination of

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being used by defendant in its condiment grinding, filling and packaging operations (including spices) at its plant in Bethlehem, Pennsylvania.

<sup>5</sup> New employees hired at Bethlehem perform duties similar to those performed at Elmhurst by plaintiffs Zdanok (coconut filling), Kreischer (spice filling), and Hackett (spice filling). Duties performed by plaintiffs Zacharezyk and Williams (shipping) at Elmhurst have been incorporated into other job classifications at Bethlehem.

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the agreement, the defendant fully complied with all statutory and contractual requirements. Nor do plaintiffs challenge defendant's right or impugn its good faith in closing the Elmhurst plant and establishing a new plant in Bethlehem. *Cf. United Steel Workers v. New Park Mining Co.*, 169 F. Supp. 107, 110-11 (D. Utah 1958). The sole issue raised by the complaint concerns the scope and significance of the seniority provisions of the collective bargaining agreement.<sup>6</sup>

Plaintiffs maintain that it was an implied condition of the bargain between the union and the company that the seniority rights created by the contract would survive the termination date of the agreement. It is urged that to meet the continuing obligations imposed by the surviving seniority provisions, defendant was required to offer plaintiffs employment at Bethlehem to which seniority status acquired at Elmhurst would attach. Plaintiffs claim that defendant's failure to make such an offer resulted in the deprivation, not only of their right to continued employment, but also of their interest in fringe benefits arising from defendant's pension<sup>7</sup> and group life insurance<sup>8</sup> plans and the union's welfare plan.<sup>9</sup>

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<sup>6</sup> Under the circumstances of this case, plaintiffs have standing as beneficiaries of the collective bargaining agreement to enforce provisions made for their benefit. *Local Lodge 2040 v. Servel, Inc.*, 268 F. 2d 692, 696 (7th Cir.), cert. denied, 361 U. S. 884 (1959). 6 Corbin, Contracts §1420 n. 73 (1951, Supp. 1959).

<sup>7</sup> "Pursuant to the terms of the contract, the employees of the defendant at its plant in Elmhurst, New York were entitled to certain benefits under the defendant's Retirement Plan for Hourly Employees provided they complied with certain necessary conditions of the Plan. The Plan provides for benefits for employees retiring at 65 years of age. It further provides for retirement of employees after reaching 55 years of age while still employed by the defendant and having 15 years of credited service with the defendant. Also, an employee with 15 years of credited service with the defendant who is totally and permanently disabled at any time while employed by the defendant receives retirement benefits. Vested rights to retirement benefits at age 65 are acquired

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Defendant contends that no implied understanding as to the survival of seniority rights can reasonably be drawn from the terms of the agreement or the prior relationship of the parties. Rather, it is defendant's position that seniority ratings acquired at Elmhurst and the benefits secured by such ratings derived from and depended upon a

after the employee reaches age 45 while still employed by the defendant and has 15 years of credited service with the defendant. The Plan is non-contributory and the defendant pays the entire cost of the benefits. The Plan covers regular hourly employees of the defendant employed at its various plants throughout the United States where the Plan is in effect. Upon termination of employment of the employees at the defendant's plant in Elmhurst, New York on November 30, 1957, those who were 65 years of age, or who had 15 years of credited service and were 55 years of age and who elected to receive retirement benefits early were eligible for and are presently receiving retirement benefits pursuant to the defendant's Retirement Plan for Hourly Employees. Those employees who were 45 years of age and had 15 years of credited service were advised by the defendant of their vested rights in the Plan to retirement benefits upon reaching 65 years of age. With the exception of the aforementioned employees, no other employees of the defendant's plant in Elmhurst, New York received any benefits under the defendant's Retirement Plan for Hourly Employees after employment was terminated at such plant." Transcript, pp. 7-8.

<sup>8</sup> "There is no reference in the contract to the defendant's Group Life Insurance Plan. However, on a voluntary basis, the defendant made its employees of its plant in Elmhurst, New York eligible under this plan for six consecutive months of employment. Pursuant to the terms of the plan, the life insurance coverage for each employee was continued for 31 days after the employee's termination of employment." Transcript, p. 10.

<sup>9</sup> "Pursuant to the terms of the contract the defendant was required to pay 4½¢ an hour per employee or a maximum of \$1.80 per employee per week into the Union Welfare Fund during the term of the aforementioned contract.

"This requirement was amended December 1, 1956 so that the defendant was required to pay 8.55¢ per hour per employee or a maximum of \$3.42 per employee per week for the remainder of the term of the contract. The defendant had no control or responsibility for the administration of the Union Welfare Plan other than to make the aforementioned payments." Transcript, p. 9.

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contract expressly confined in scope and application to terms and conditions of employment at the plant in Elmhurst. Accordingly, defendant asserts that upon cessation of operations and lawful termination of the agreement, the subject of plaintiffs' seniority rights, *i.e.*, employment at Elmhurst, ceased to exist. In short, defendant maintains that the contracting parties never bargained for transferable seniority rights and that the implication that such rights were designed to outlive the life of the plant and the agreement is without foundation.

THE PRIOR PROCEEDINGS AND THE  
DEFENSE OF RES JUDICATA.

On October 23, 1957, Local 852 served on defendant a notice of intention to arbitrate certain disputes pursuant to section 1458(a) of the New York Civil Practice Act and the terms of the collective bargaining agreement. The defendant then moved in the Supreme Court of New York, Queens County, to stay arbitration upon the ground that the disputes were not arbitrable under the arbitration clause of the collective bargaining agreement. That clause provides as follows:

“Any question, grievance or dispute arising out of and involving the interpretation and application of the specific terms of this Agreement . . . shall, at the request of either party, be referred to the New York State Mediation Board for arbitration.”

The court granted defendant's motion, holding that the issues tendered for arbitration did not “arise out of the specific terms” of the collective bargaining agreement. In an opinion filed in support of its order staying arbitration,<sup>10</sup> the court stated:

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<sup>10</sup> *Matter of General Warehousemen's Union*, 10 Misc. 2d 700, 172 N. Y. S. 2d 678 (1958).

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"[N]o provision was made in the collective bargaining agreement relating to the continuance or discontinuance of operations at Elmhurst; for the continuance of employment of employees covered by the said agreement for any period of time other than the expiration date thereof, nor requiring the company to offer to each employee continued employment with full seniority in the event of discontinuance. It cannot, therefore, be said that the disputes the Union claims to have with Glidden are referable to arbitration under a clause which requires arbitration only with respect to '*specific terms*' of a collective bargaining agreement."

.....

"It follows . . . that Glidden's motion to stay arbitration must be granted, whatever other remedies the union may have with respect to the alleged disputes." (10 Misc. 2d 700 at 705-6, 172 N. Y. S. 2d at 683-84).

Following this decision the plaintiffs instituted the present action. Before interposing its answer, defendant moved for summary judgment urging that the doctrine of *res judicata* required dismissal of the plaintiffs' claim. In a memorandum order, Judge Dimock denied the defendant's motion.<sup>11</sup> Defendant then filed its answer, affirmatively alleging the defense of *res judicata*.

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<sup>11</sup> The memorandum reads as follows:

"Defendant moves for summary judgment on the ground that a state court has held that plaintiffs' claim is without substance and that it should therefore be dismissed as *res judicata*. I do not agree that the claim has been held to be without substance. I read the state court opinion as holding only that the claim is not within the arbitration agreement there sought to be enforced. My construction of the state court ruling is enforced by the statement at the end of the judge's opinion, Mtr. of Gen. Warehousemen's Union, 10 Misc. 2d 701, 706, ' . . . motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes.' " (S. D. N. Y. September 22, 1958).

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The question of fact litigated and determined by the state court and essential to its order staying arbitration was whether or not the claims as to survival of seniority rights arose out of the specific terms of the agreement. The state court found that none of the specific contractual provisions expressly conferred the rights now asserted by plaintiffs.<sup>12</sup> As to this issue, the state court judgment should have a collateral estoppel effect<sup>13</sup> precluding plaintiffs from relitigating the question whether their claims arise out of the specific language of the contract. However, defendant is entitled to no further benefit by reason of the prior adjudication.<sup>14</sup> To determine whether the union's claims were arbitrable, the state court was not required to reach the issue presented here. For plaintiffs now urge that when the ambiguities and gaps in the contract are studied in the context of the long-term employment relationship existing between the parties, the survival of seniority rights emerges as an implied part of the bargain.<sup>15</sup> In other words, the plaintiffs seek application of the agree-

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<sup>12</sup> "In the case at bar the Union has not been able to point to any specific term or provision in the collective bargaining agreement in question or by reference to the welfare, pension and group insurance plans which are part of this record, requiring Glidden to continue operations at Elmhurst or to continue the employment of any employee for any period of time, certainly not beyond the expiration date of the agreement, or to offer to each employee employment with full seniority after the discontinuance of such operations, or as an alternative severance pay, or in any way dealing with alleged property rights for employees whose employment has been terminated by Glidden's discontinuance in good faith of its operations at Elmhurst." (10 Misc. 2d at 704, 172 N. Y. S. 2d at 682).

<sup>13</sup> See Restatement, Judgments §§45(c), 65(2), 68, 80(4) (1942). See also *Schuylkill Fuel Corp. v. B & C Nieberg Realty Corp.*, 250 N. Y. 304, 165 N. E. 456 (1929).

<sup>14</sup> See Restatement, Judgments, *supra* §68(2); *Karameras v. Luther*, 279 N. Y. 87, 17 N. E. 2d 779 (1938).

<sup>15</sup> Cf. *Groseclose v. Great Northern Ry.*, 25 F. R. D. 181 (D. Mont. 1960). See generally, Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1490-98 (1959).

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ment, in a manner alleged to be consistent with the intent of the parties, to a situation for which no specific provision was made.<sup>16</sup>

**THE SCOPE OF THE BARGAIN.**

Under the seniority system in effect at Elmhurst,<sup>17</sup> employees were to be laid off in reverse order of plant seniority and recalled in inverse order of layoff. In instances of continuous layoff, the seniority of an employee with less than five years' employment was to terminate after two years' continuous layoff; for employees with more than five years' service, seniority was to be terminated at the end of three years.<sup>18</sup> If seniority had been terminated by reason of continuous layoff, a former employee would still be entitled to preference before new employees were hired.<sup>19</sup> Plaintiffs point out that their employment was terminated by defendant shortly before the expiration date of the contract.<sup>20</sup> Therefore, they assert that their rights to three-year retention of seniority and indefinite preferential rehiring had accrued while the contract was fully effective. In other words, plaintiffs view the termination of their employment as a layoff due to curtailment of production and claim that their accrued three-year seniority

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<sup>16</sup> Cf. *Brooklyn Eagle, Inc.*, 32 Lab. Arb. 156, 167-78 (1959).

<sup>17</sup> See Exhibit A (Dec. 1, 1955-Nov. 30, 1957 Collective Bargaining Agreement), Article XI.

<sup>18</sup> The plaintiffs herein had been employed by the defendant at its Elmhurst plant for periods ranging between ten and twenty-five years.

<sup>19</sup> The seniority system outlined in the text had been in effect continuously since December 1, 1949, the effective date of the first collective bargaining agreement between the Glidden Company and Local 852.

<sup>20</sup> See note 3, *supra*.

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retention rights entitled them to resume work when operations commenced in Bethlehem.<sup>21</sup>

Whether the agreement should be understood to assure to plaintiffs retained seniority rights had operations continued at Elmhurst after the collective bargaining agreement expired would present a troublesome question of construction. See *United Steelworkers v. Enterprise Wheel and Car Corp.*, ..... U.S. ..... (June 20, 1960). However, it is unnecessary to determine whether plaintiffs are correct in asserting that the expired agreement continued to afford recall rights to employees or whether, as defendant urges, all recall rights terminated when the period of the agreement came to an end.<sup>22</sup> For the critical issue is not whether plaintiffs' seniority retention rights accrued during the effective period of the collective bargaining

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<sup>21</sup> Plaintiffs concede that seniority rights created by a collective bargaining contract are not indestructible. See *Elder v. New York Cent. R. R.*, 152 F. 2d 361 (6th Cir. 1945). However, they urge that on the facts presented here plaintiffs' status could not be destroyed unless Local 852 and the Glidden Company agreed to a modification of employee seniority rights.

<sup>22</sup> The cases upon which plaintiffs rely relating to the survival of rights to vacation and severance pay are inapposite. In those cases the full consideration for the employer's obligation had been furnished by the employees. Although termination of employment followed termination of the contract, the obligation to pay related to services already performed at the plant covered by the agreement. *Matter of Potoker*, 286 App. Div. 733, 146 N. Y. S. 2d 616 (1st Dep't 1955), affirmed, 2 N. Y. 2d 553, 161 N. Y. S. 2d 609 (1957), cert. denied, 355 U. S. 883 (1957), arbitration reported *sub nom. Brooklyn Eagle, Inc.*, 32 Lab. Arb. 156 (1959); *Owens v. Press Publishing Co.*, 20 N. J. 537, 120 A. 2d 442 (1956). In view of the apparent purpose of such vacation and severance pay provisions, it would be unreasonable to suppose that the parties did not expect their rights and obligations to be determined by reference to their prior understanding and practice. By contrast, the plaintiffs here seek damages for violation of their alleged right to transfer and continue an employment relationship involving future performance obligations on both sides.

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agreement and survived its termination,<sup>23</sup> but whether the unit to which their rights could attach extended beyond the Elmhurst plant.<sup>24</sup> It is not enough for plaintiffs to establish that if Elmhurst operations had continued, their seniority status would have survived termination of the collective bargaining agreement. In order to recover, plaintiffs must also show the governing seniority system gave them the right to "follow their work" to the new plant.

I find nothing in the record to warrant the conclusion urged by plaintiffs as to the unlimited geographic scope of their seniority rights. Wide variations exist in seniority systems used in industry. See *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U. S. 521, 526-27 (1949). With respect to the unit covered, an entire multi-plant company or district may be made subject to the same system, or the system may be limited to a particular plant, department or occupation.<sup>25</sup> Under the circumstances presented here—

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<sup>23</sup> See *Owens v. Press Publishing Co., supra*, note 22 (discharge from service during term of a contract is not a condition *sine qua non* to the enforcement of an accrued right).

<sup>24</sup> Plaintiffs' emphasis on the controlling significance of the technical accrual dates of their seniority rights is somewhat anomalous in view of the broad non-technical interpretation they urge with respect to the extent of the seniority unit. See Transcript, pp. 45, 51-54.

Under the circumstances presented here, it is altogether likely that the two and three year recall provisions were inserted to protect the plant seniority status of laid off employees should the agreement be automatically renewed from year to year beyond the specified expiration date. See Exhibit A, Article XXII. In the event of such automatic continuation of the agreement, accrued plant recall rights of employees who were laid off at the time renewal occurred would remain in full effect.

<sup>25</sup> The following units, among others, have been designated in collective bargaining agreements as the area within which employees may exercise seniority rights:

"*Companywide Seniority*.—Length of the service computed from the date of hiring into the company. All employees, regardless of plant location, ranked on the same seniority list.

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the situation of the contracting parties,<sup>26</sup> their description of the subject of their agreement<sup>27</sup> and the absence of any prior history as to transferred seniority rights<sup>28</sup>—I have concluded that the parties' bargain and understanding was limited to seniority rights at the Elmhurst plant.

*"Plant Seniority."*—The length of time an employee has worked in the plant. All employees of the plant ranked on the same seniority list.

*"Department Seniority."*—The length of time an employee has worked in a particular department.

*"Job Seniority."*—The length of time an employee has worked on a particular job or in a particular job classification."

See Collective Bargaining Clauses: Layoff, Recall, and Work Sharing Procedures, U. S. Dept. of Labor, Bull. 1189, p. 42 (1956).

<sup>26</sup> At the hearing, plaintiffs' counsel conceded that even if all the 160-odd employees at the Elmhurst plant had accepted employment at Bethlehem, Local 852 could not continue as accredited bargaining representative. Transcript, p. 53.

<sup>27</sup> The agreement is entitled: "AGREEMENT between DURKEE FAMOUS Foods, Division of The Glidden Company, No. 23—Elmhurst, New York, and GENERAL WAREHOUSEMEN'S UNION, LOCAL 852 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN, December 1, 1955 to November 30, 1957."

Its preamble reads: "THIS AGREEMENT MADE AND ENTERED INTO AT NEW YORK, NEW YORK, by and between THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York, hereinafter referred to as 'the Company', and GENERAL WAREHOUSEMEN'S UNION, LOCAL 852 affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, hereinafter referred to as 'the Union'."

<sup>28</sup> In the latter part of 1956 the defendant discontinued preparation at Elmhurst of shortening, confectionery products, and various oil products. These operations are now conducted at the defendant's plant in Louisville, Kentucky. The record contains no evidence of any proceedings between Local 852 and the Glidden Company with respect to this matter.

*Cf. Groseclose v. Great Northern Ry.*, 25 F. R. D. 181 (D. Mont. 1960); *Wilson v. Illinois Central R.R.*, 21 F. R. D. 588, 589 (N. D. Ill. 1957). See generally Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097, 1116-33 (1950).

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The agreement between Glidden and Local 852 refers to plant and department seniority but no reference is made to extension of the unit contingent upon events such as plant abandonment, transfer, merger or consolidation of operations.<sup>29</sup> However, agreements containing provisions for extension of the area in which seniority rights may be exercised are not uncommon. Since such provisions are tailored to meet the needs of particular enterprises, they vary considerably in form and content. For example, they may be limited to a specific time period, to new plants only, or to employees laid off as a result of total plant closing.<sup>30</sup> In view of the alternative techniques which might be employed to deal with the issue of interplant seniority,<sup>31</sup>

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<sup>29</sup> See Exhibit A, Article XI.

<sup>30</sup> See Analysis of Layoff, Recall and Work-Sharing Procedures in Union Contracts, U. S. Dept. of Labor, Bull. 1209, pp. 25-34 (1957).

<sup>31</sup> Techniques which have been used to deal with interplant transfer situations are illustrated by the following clauses:

*"Multiplant company agreement: Employees laid off given preference in employment over applicants at other company plants*

*"Employees laid off in any plant through reduction of force, desiring employment in other plants of the company, may make application at such other plants in the regular manner and will receive preference for any vacancy they may be qualified to fill before new employees are hired."* Bull. 1189, *supra* note 22 at p. 33.

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*"When operations or departments are transferred from one plant to another plant of the corporation, employees engaged on such operations or employed in such departments who are out of work as a result of the transfer may if they so desire be transferred to the other plant and carry their ranking for seniority to the other plant."* Collective Bargaining Provisions: Seniority, U. S. Dept. of Labor, Bull. 908-11, pp. 47-48 (1949).

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*"Accumulated Seniority Transferred with Employee to Another Plant in Event of Geographical Relocation*

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it would be unreasonable to expect a court to imply a general understanding between the parties as to the extent of the seniority unit when no evidence has been offered as to

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"In the event of the geographical relocation in whole or in part of any of the work performed by any of the employees covered by this agreement, the employee affected, after due consideration for the seniority rights of the employees at the new location, may be transferred at company expense to the new location and given full credit for their accumulated classification seniority at the point to which the work is transferred in whole or in part." Bull. 908-11, *supra*, p. 49.

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*"Company-Wide Seniority"*

"Seniority of employees shall be company-wide and such seniority shall commence from original date of employment in the production and maintenance departments of the company's operations for employees certified in the order issued by the National Labor Relations Board." Bull. 908-11, *supra*, pp. 15-16.

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*"State-Wide Seniority"*

"For the purpose of applying the seniority provisions of this article the State of ..... shall be regarded as the unit." Bull. 908-11, *supra*, p. 16.

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*"Seniority by Geographical District; Modifications by Mutual Agreement"*

"The operations of the company shall be divided into the following five (5) seniority districts in which operators there regularly employed shall hold seniority.

District 1 .....	• • • Regions
District 2 .....	• • • Regions
District 3 .....	• • • Regions
District 4 .....	• • • Regions
District 5 .....	• • • Regions

"If any change occurs in the operations of the company which would necessitate an increase in, decrease from, or rearrangement of the above named seniority districts the company agrees that said increase, decrease, or rearrangement shall be subject, as same affects seniority, of further negotiations and agreement between the parties hereto." Bull. 908-11, *supra*, p. 16.

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negotiations on the subject or an established course of practice on the part of the employer.

Contrary to plaintiffs' contention, the collective bargaining agreement does not become illusory if its provisions are held to relate to a single existing plant. This is not the case of an employer who has abandoned the specified plant and transferred operations to a new location in order to circumvent contractual or statutory requirements.<sup>32</sup> Where, as here, the Board of Directors' decision to relocate is based on an exercise of business judgment in good faith, the employer's obligation to deal fairly and honestly with its employees is satisfied.<sup>33</sup> In sum, under the circumstances presented in this case, where no relevant limitation on the employer's freedom of action is found in the agreement or the prior conduct of the parties, no policy of New York law or our national labor law requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant.<sup>34</sup>

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<sup>32</sup> Cf. *Matter of Jacob H. Klotz*, 13 N. L. R. B. 746 (1939) (employer acted in bad faith in transferring operations to a new location).

<sup>33</sup> In urging that they have been deprived of rights under the Retirement Plan, Group Life Insurance Plan, and Union Welfare Plan, see notes 7-9, *supra*, plaintiffs do not rely upon any provision contained in special agreements setting up the plans. Rather, they assert that they have been deprived of rights under each of the plans by reason of defendant's alleged breach of the seniority provisions of the collective bargaining agreement.

<sup>34</sup> See *Local Lodge 2040 v. Servel, Inc.*, 268 F. 2d 692, 698 (7th Cir.), cert. denied, 361 U. S. 884 (1959); *System Federation No. 59 v. Louisiana & A. Ry.*, 119 F. 2d 509 (5th Cir. 1941); Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1497 (1959); Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 401 (1950).

**Conclusion.**

Accordingly, it is my conclusion that plaintiffs have failed to prove facts which would entitle them to the relief sought. The Clerk is directed to enter judgment on the merits and costs against the plaintiffs. Fed. R. Civ. P. 52(a).

So ORDERED.

Dated: New York, N. Y.  
June 30, 1960.

/s/ EDMUND L. PALMIERI  
EDMUND L. PALMIERI  
U. S. D. J.

Judgment Entered 6/30/60

HERBERT A. CHARLSON  
Clerk

*Appendix A.*

**Opinion of the United States Court of Appeals  
for the Second Circuit.**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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No. 217—October Term, 1960.

(Argued February 8, 1961      Decided March 28, 1961.)

Docket No., 26542

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OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS and MARCELLE KREISCHER,  
Plaintiffs-Appellants,

v.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,  
a Foreign Corporation,  
Defendant-Appellee.

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Before:

LUMBARD, Chief Judge,

MADDEN, Judge, United States Court of Claims,\*  
and WATERMAN, Circuit Judge.

Action by former employees for damages for breach of collective bargaining agreement. The United States District Court for the Southern District of New York, Edmund L. Palmieri, J., held that plaintiffs had no rights to preserve seniority status under the expired collective agreement. 185 F. Supp. 441. Plaintiffs appealed. The Court of

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\* Sitting by designation.

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Appeals, **MADDEN**, Judge, United States Court of Claims, held that a state court's decision refusing to compel arbitration was not *res judicata* of plaintiffs' claims, that plaintiffs were entitled individually to enforce their seniority rights under the collective agreement, and that plaintiffs' rights under the agreement were violated when their employer deprived them of continued employment with accrued seniority at the employer's new plant location.

Reversed.

**MORRIS SHAPIRO**, New York, N. Y. (**HARRY KATZ, SAHN, SHAPIRO & EPSTEIN**, New York, N. Y., on the brief), for plaintiffs-appellants.

**CHESTER BORDEAU**, New York, N. Y. (**CHARLES C. HUMPHSTONE, WHITE & CASE**, New York, N. Y., on the brief), for defendant-appellee.

**MADDEN**, Judge:

The plaintiffs sued in the District Court for the Southern District of New York for damages for alleged breach by the defendant of a contract made for their benefit by a labor union. The District Court had jurisdiction because of diversity of citizenship. The Court decided that they were not entitled to recover, 185 F. Supp. 441, and they have appealed.

From 1929 until November 30, 1957, the defendant operated a plant at Elmhurst, New York, known as its Durkee Famous Foods Division. The plaintiffs are members of General Warehousemen's Union, Local 852, which is affiliated with the Teamsters' Union. The defendant and Local 852 had had collective bargaining agreements since December 1, 1949, each agreement covering a two-year period. The last agreement covered the period December 1, 1955 to November 30, 1957.

Each agreement contained a provision establishing a system of seniority which required that in case of a curtail-

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ment of production, employees were to be laid off in the reverse order of seniority. If, at the time he was laid off, an employee had had five or more years of continuous employment, his seniority would entitle him to be reemployed if an opening for reemployment for one having his seniority occurred within three years after his lay-off. If he had had less than five years of employment before his lay-off, he would be entitled to reemployment if an opening for one with his seniority occurred within two years after his lay-off. The contract between the union and the employer contained a non-contributory pension plan, with normal retirement on pension at age 65, early retirement at 55 if the employee had had 15 years of service, and other types of pensions under specified conditions. The contract also included hospital, medical and surgical insurance, life insurance and accidental death insurance to be paid for by the employer.

On September 16, 1957 the defendant gave written notice to the union that it would terminate the collective bargaining contract at its expiration date, November 30, 1957. After September 16 it began to reduce production at Elmhurst, and to remove its machinery and equipment from Elmhurst to a newly established plant at Bethlehem, Pennsylvania. The employment of four of the five plaintiffs was terminated on November 1, and that of the fifth one on November 18. The ages of the five plaintiffs, at the time of their discharge, ranged from 43 to 61 years, and their periods of employment with the defendant ranged from 10 to 25 years.

The defendant removed a considerable part of its machinery from its Elmhurst plant to the new Bethlehem plant, and manufactured there a number of the same products. The Bethlehem plant was more modern and efficient, and apparently had a considerable number of new machines, in addition to the ones moved from Elmhurst. Some of the products formerly made at Elmhurst were, after the closing of that plant, made at the defendant's Louisville plant.

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There was work at the Bethlehem plant similar to that done at Elmhurst by three of the plaintiffs. As to the other two plaintiffs, who were men, aged 43 and 49, their work at Elmhurst was to check merchandise that was loaded or unloaded from trucks leaving or entering that plant. At the Bethlehem plant such duties have been incorporated into other job classifications which specify the employee to load and unload the trucks and to operate an electric walking type lift truck to stack the merchandise in the storage area as well as to check the incoming and outgoing merchandise that the employee loads and unloads. This different Bethlehem work would not seem to have required any skill that could not have been acquired in a short time.

The defendant offered to give fair consideration to applications for employment at its Bethlehem plant, to its former employees at Elmhurst, only if they would come to Bethlehem and make application there on the same basis as new applicants who might seek employment there. Two Elmhurst employees, not plaintiffs herein, made such applications, and their applications were accepted. Only one of them actually went to work. He has been considered as a new employee at Bethlehem, with no seniority carried over from Elmhurst.

The plaintiffs contend that they were, as beneficiaries of the contract between their union and the defendant, entitled to the jobs which were created by the opening of the plant at Bethlehem. They say that they were laid off because of the removal of the machinery and the cessation of operations at Elmhurst, and that as work was opened up at Bethlehem they were entitled, by reason of their seniority and the contract provisions relating to it, to go to work at Bethlehem with the seniority which they had acquired at Elmhurst.

The defendant offers several defenses. We consider first the defense of *res judicata*. That defense was considered and rejected, first by Judge Dimock, on a motion by the

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defendant for summary judgment and again, after the defendant had filed its answer asserting *res judicata* as an affirmative defense, by Judge Palmieri, in his decision and opinion on the merits of the case.

Local 852, the plaintiffs' union, served on the defendant a notice of intention to arbitrate certain designated disputes, pursuant to the arbitration provision in the union's contract with the defendant. The defendant made a motion in the Supreme Court of New York to stay arbitration, on the ground that the disputes were not arbitrable under the arbitration provision of the contract. That provision said:

Any question, grievance or dispute arising out of and involving the interpretation and application of the specific terms of this Agreement \* \* \* shall, at the request of either party, be referred to the New York State Mediation Board for arbitration.  
(Emphasis supplied.)

The court granted the defendant's motion, on the ground that the subjects sought to be arbitrated were not covered by the specific terms of the contract. The court's opinion<sup>1</sup> lays much emphasis on the word *specific* in the agreement to arbitrate and says that "no one is under a duty to resort to arbitration unless by clear language he has so agreed." The court concluded its opinion with this sentence:

It follows from all the foregoing that Glidden's motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes.

The New York court's opinion as a whole, and its concluding paragraph seem to us to show that the court was deciding nothing more than that the arbitration provision, as nar-

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<sup>1</sup> *Matter of General Warehousemen's Union*, 10 Misc. 2d, 700, 172 N. Y. S. 2d 678 (1958).

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rowly written, did not confer jurisdiction upon an arbitration tribunal to adjudicate the disputes in question. If the court had decided, as the defendant claims, that the contract as a whole, in its circumstances, and including its fair implications, conferred no rights upon the union or the employees with regard to the asserted disputes, the court's concluding paragraph defies understanding.

The defendant also contends that because the collective bargaining agreements contained provisions for the arbitration of disputes, the plaintiffs are not entitled to individually enforce their rights under the agreement. The defendant relies heavily upon *Parker v. Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297 (1959), as support for its contention that the plaintiffs individually are not entitled to enforce the rights which they claim here. In the *Parker* case, the plaintiff had been discharged "for cause." He invoked the grievance procedure of the collective bargaining agreement between his union and employer. He was not reinstated, and the union refused his request to seek arbitration. He thereupon moved in the United States District Court to compel the employer to arbitrate his discharge. The motion was denied.

The plaintiff then sued in the New York state courts for money damages for breach of the collective agreement, asserting that the employer did not have "cause" to discharge him. The defendant moved for a stay pending arbitration, but its motion was denied on the ground that only the employer or the union, and not an employee, could seek a submission to arbitration. The defendant then moved for summary judgment. The New York Supreme Court denied the motion, but the Appellate Division's reversal, granting the motion, was affirmed by the Court of Appeals.

The Court of Appeals said, 5 N. Y. 2d at p. 160, 156 N. E. 2d at p. 299, that "the employee is the direct beneficiary" of provisions in a collective agreement prohibiting discharge of an employee except for cause. The court held, however, that the plaintiff, who was also "bound by and lim-

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ited to the provisions of the agreement," had "entrusted his rights to his union representative," who alone could have sought arbitration of the plaintiff's discharge. 5 N. Y. 2d at p. 161, 156 N. E. 2d at pp. 299-300. The court noted that the plaintiff's only remedy would be against the union for failing to fulfill its duties under the agreement.

The *Parker* case is, therefore, significantly different from the instant case. In *Parker*, the question which the plaintiff sought to litigate had been entrusted by him, under the collective agreement, to the arbitration process. That was the interpretation which the New York Court of Appeals placed upon the contract there before it. In the instant case, as we have seen, the Supreme Court of New York has held that the dispute with which this suit is concerned is *not* covered by the arbitration provision of the agreement.<sup>2</sup> The plaintiffs have not, therefore, entrusted to their union representative the rights which they now seek to enforce.

As to the merits of the plaintiffs' claims, the defendant takes the bold position that the collective bargaining contract conferred upon the employees no rights which survived the contract. It says, at page 27 of its memorandum:

Even if the Elmhurst operations had continued but the collective bargaining agreement had expired, the seniority status of plaintiffs would not have survived the termination of that agreement. For it is only by reason of existing provisions in the agreement that provisions relating to the seniority have any application. When such provisions no longer exist, seniority no longer exists.

The defendant may have assumed this bold and uncompromising position because it feels uneasy about Judge Palmieri's having based his decision solely upon the geo-

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<sup>2</sup> *Matter of General Warehousemen's Union, supra.*

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graphical shift of the plaintiff's factory operations. We discuss that problem later herein.

We think the defendant's language, quoted above, is not supportable. Suppose an employee had completed five years of service in October, 1957. Under the seniority provision of the collective bargaining agreement, he thinks that he has earned, and acquired, by continuous service, valuable insurance against unemployment; that by reason of having worked continuously for this company longer than many of his fellow workmen, he could not be laid off unless the lay-off cut deep into the working force; that even if he should be reached in a lay-off, he would be sure to be re-employed if at any time within three years after the lay-off his name should be reached on the seniority list, for re-employment. As we have seen, the defendant's position is that the employee had not acquired any such rights.

Rights embodied in a collective bargaining contract negotiated by a union "inure to the direct benefit of employees and may be the subject of a cause of action." *Parker v. Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297-298, citing *Barth v. Addie Co.*, 271 N. Y. 31, 2 N. E. 2d 34, and other New York cases. If one has in October a right to demand performance of the corresponding obligation at any relevant time within a period of three years, it would be strange if the other contracting party could unilaterally terminate the right at the end of three weeks. Of course the employee owning the right, or his authorized union agent, could bargain away the employee's right. Nothing of that kind occurred in the instant case.

At the time the Elmhurst employees were discharged, those who had reached the age of 65 and had otherwise satisfied the conditions prescribed in the collective bargaining agreement for receiving retired pay, were placed on the defendant's retired list and have been and are currently receiving their retired pay. Similarly, those who had reached the age of 55, or who had become permanently disabled in the service of the defendant, and had had 15

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years of employment with the defendant, are receiving their retired pay. Those who had 15 years of service and had reached the age of 45 at the time of their discharge were advised by the defendant that they had vested rights to retirement benefits and would begin to receive payments when they reached the age of 65.

These rights to retired pay, though their realization will extend far into the future, and though they arise solely and only out of the terms of the union agreement with the defendant, have been treated as "vested" rights and are being voluntarily honored by the defendant. This was, we suppose, because the employees had earned these rights by compliance with the terms of the contract, and the fact that the contract was not renewed, and that other workmen in the future might not have the opportunity to earn similar rights, was irrelevant. We think the plaintiff employees had, by the same token, "earned" their valuable unemployment insurance, and that their rights in it were "vested" and could not be unilaterally annulled.

We think, then, that if the plaintiff had continued to operate the Elmhurst plant, without a renewal of the union contract, or had reopened it after it had been closed for a time, the employees would have been entitled to reemployment, with seniority. This brings us to the issue which Judge Palmieri in the District Court, found to be the critical issue, i.e., whether the unit to which the employees' rights attached "extend beyond the Elmhurst plant." He held that the rights were not enforceable except in the Elmhurst plant, and therefore denied recovery. With deference, we disagree with this conclusion.

The union contract, in its preamble, recited that it was made by the defendant company

for and on behalf of its plant facilities located at  
Corona Avenue and 94th Street, Elmhurst, Long  
Island, New York.

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If this narrow geographical description is treated as setting fixed boundaries upon the scope of the contract, difficulties immediately arise. If the plant moved from 94th Street to 93d Street in Elmhurst, an entire structure of valuable legal rights would tumble down. *A fortiori* if the plant moved to a site a few miles or a good many miles away, the consequence would be the same. But one would be obliged to wonder why so catastrophic a consequence should follow a mere change in physical location. And it would be hard to conjure up a reason why it should. Rather it would seem that the recital in the contract would be analogous to the *descriptio personae* familiar to the law in various situations.

A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it. Contracts must, in all fairness, be construed *ut res magis valeat quam pereat*. If not, the reasonable expectations of the parties are sacrificed to sheer verbalism.

In the instance case the plant was, of course, not moved from 94th Street to 93d Street in Elmhurst, nor from Elmhurst to another town within commuting distance of the then residences of the employees. It was moved to a city in another state. That fact does not seem to us to be decisive. It would, of course, have confronted the employees with troublesome problems. They would have had to decide whether the advantages of continued employment with this employer, the right to which they had earned in Elmhurst, were sufficient to induce them to make so considerable a move. It is probable that many of them would not have made the move. Those to whom the defendant had offered employment in Bethlehem, who did not accept the offer, would have, in effect, resigned their seniority and the rights that accompanied continued employment.

We can see no expense or embarrassment to the defendant which would have resulted from its adopting the more rational, not to say humane, construction of its contract.

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The plaintiffs were, so far as appears, competent and satisfactory employees. They had long since completed the period of probation prescribed in the union contract. It would seem that they would have been at least as useful employees as newly hired applicants. The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement there, at the time the plant was opened.

In the circumstances, no detriment to the defendant would have resulted from a recognition by the defendant of rights in its employees corresponding with their reasonable expectations. In that situation, a construction of the contract which would disappoint those expectations would be irrational and destructive.

It follows from what we have said that the plaintiffs were entitled to be employed at the defendant's Bethlehem plant, with the seniority and reemployment rights which they had acquired at the Elmhurst plant. The refusal of the defendant to recognize that entitlement was a breach of contract, and the plaintiffs are entitled to recover the damages which that breach has caused them.

The plaintiffs allege in their complaint that they have been "deprived of employment by the defendant," as a result of the defendant's conduct recited above. That is an adequate allegation that they would have accepted employment at Bethlehem if it had been offered to them on the terms to which they were entitled. Proof of this allegation may well fall short of complete conviction, but the trier of fact will not penalize the plaintiffs on account of the uncertainty which has been caused by the defendant's conduct.

Whatever pension rights would have been earned by employment at Bethlehem, if it had been accepted, must be recognized by the defendant.

Since the case will be remanded, we leave to the District Court consideration of the right of recovery, if any, in connection with the welfare plan and the group insurance plan which were included in the union agreement.

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It appears that the named plaintiff Mary A. Hackett is deceased, and that no motion for substitution has been made. Unless a proper motion is made, the District Court will dismiss the complaint as to that plaintiff.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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LUMBARD, Chief Judge (Dissenting):

For the reasons persuasively set forth in Judge Palmieri's careful and thorough opinion, reported at 185 F. Supp. 441, I would affirm.

It is immaterial to the resolution of the question before us that the employment of competent and satisfactory employees is suddenly terminated, or even that the employer has acted ungenerously, as indeed it has. We are called upon to construe the contract upon which the parties agreed and not to substitute for it one with more humane or less destructive terms.

The parties have assumed here that the Supreme Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957), did not *sub silentio* overrule the distinction between "individual" and "union" rights announced in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Co.*, 348 U. S. 437, 461 (1955). Although the survival of this distinction gives the employees standing personally to assert "individual" rights arising out of a collective-bargaining agreement, *Local Lodge 2040 v. Servel, Inc.*, 268 F. 2d 692, 696 (7th Cir.), cert. den. 361 U. S. 884 (1959), the contract should be construed in light of federal substantive law pursuant to §301 of the Labor Management Relations Act, 29 U. S. C. §185.

The federal cases hold that seniority is not inherent in the employment relationship but arises out of the contract.

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E.g., *Elder v. New York Central R.R.*, 152 F. 2d 361, 364 (6th Cir. 1945); see Note, 54 Nw. U. L. Rev. 646, 649-50 (1959). If rights are to persist beyond the term of the collective-bargaining agreement, the agreement must so provide or be susceptible of such construction. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

The agreement we are here called upon to interpret did not expressly provide for any retention of seniority rights beyond the termination of the collective-bargaining agreement. The employees claim, however, that by agreeing to rehire on the basis of seniority for two or three years after layoff, the employer undertook not only to retain seniority rights after the expiration of the agreement but to extend existing seniority privileges to any other location to which the work then done at Elmhurst would be assigned. Relocation of an employer's plant does not, of course, automatically terminate all rights under a collective-bargaining agreement; whether such rights continue depends on the terms of the contract. See *Metal Polishers Local 44 v. Viking Equipment Co.*, 278 F. 2d 142 (3d Cir. 1960). The issue here is whether this collective-bargaining agreement gave the employees the right to "follow the work" to the new site. I would hold that it did not.

The closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly done in good faith and were not wholly unforeseeable. As Judge Palmieri points out, it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely unions are now fully of age and are able to protect themselves and their members at the bargaining table. The consequences of dismissing the plaintiffs' case might indeed be unfortunate and even "catastrophic" from their point of view, but it is hardly "irrational and destructive" for a court to leave the parties as they are if they have never seen fit to provide otherwise.

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Judgment of the United States Court of Appeals  
for the Second Circuit.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

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At a Stated Term of the United States Court of Appeals,  
in and for the Second Circuit, held at the United States  
Courthouse in the City of New York, on the twenty-eighth  
day of March, one thousand nine hundred and sixty-one.

Present:

Hon. J. EDWARD LUMBARD,  
Chief Judge,

Hon. J. WARREN MADDEN,  
Judge, Court of Claims,

Hon. STERRY R. WATERMAN,

Circuit Judges.

OLGA ZDANOK, JOHN ZACHARCZYK, MARY  
A. HACKETT, QUITMAN WILLIAMS  
and MARCELLE KREISCHER,  
Plaintiffs-Appellants,

*v.*

THE GLIDDEN COMPANY, DURKEE  
FAMOUS FOODS DIVISION, A FOREIGN  
CORPORATION,  
Defendant-Appellee.

Appeal from the United States District Court for the  
Southern District of New York.

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This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings not inconsistent with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO,  
Clerk.

## APPENDIX B.

### CONSTITUTION OF THE UNITED STATES OF AMERICA.

#### ARTICLE. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

\* \* \* \* \*

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

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To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

**ARTICLE. III.**

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

*Appendix B.*

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

*Appendix B.*

**Title 28 U. S. C.**

**§171. APPOINTMENT AND NUMBER OF JUDGES; CHARACTER OF COURT**

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims. Such court is hereby declared to be a court established under article III of the Constitution of the United States. As amended July 28, 1953, c. 253, §1, 67 Stat. 226; Sept. 3, 1954, c. 1263, §39(a), 68 Stat. 1240.

**Title 29 U. S. C.**

**§157. RIGHT OF EMPLOYEES AS TO ORGANIZATION, COLLECTIVE BARGAINING, ETC.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title I, §101, 61 Stat. 140.

**§158. UNFAIR LABOR PRACTICES.**

- (a) It shall be an unfair labor practice for an employer—
  - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

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(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

**§185. SUITS BY AND AGAINST LABOR ORGANIZATIONS—VENUE, AMOUNT, AND CITIZENSHIP.**

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

FILED

JUL 24 1961

No. 242

JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1960

THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION, a foreign corporation,

*Petitioner,*

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS and MARCELLE  
KREISCHER,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF PENNSYLVANIA STATE CHAMBER OF COMMERCE AS *AMICUS CURIAE*

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IN THE  
**Supreme Court of the United States**

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**October Term, 1960**

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**Docket No.**

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**THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION, a foreign corporation,**  
*Petitioner,*  
**against**

**OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS and MARCELLE  
KREISCHER,**  
*Respondents.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT.**

---

**BRIEF OF PENNSYLVANIA STATE CHAMBER OF  
COMMERCE AS *AMICUS CURIAE***

---

By consent of the petitioner and the respondents, in-dorsed on Consent to Filing of Amicus Curiae Brief, submitted herewith, Pennsylvania State Chamber of Commerce files this brief as *amicus curiae*.

### **Interest of the *Amicus Curiae***

The *amicus curiae*, Pennsylvania State Chamber of Commerce, (hereinafter sometimes called the "Chamber") has an interest in the instant case in that it is an association representing more than four thousand manufacturers, businessmen and employers who are engaged in all phases of industry and commerce in all areas of the Commonwealth of Pennsylvania. One of the paramount responsibilities of the Chamber is to advise employer-members of current developments in labor relations and to aid them in formulating policies in matters concerning collective bargaining. Many of the members of Chamber are currently parties to collective bargaining agreements which contain seniority provisions identical or similar to those which are involved in the instant case.

In addition to playing an important role in influencing the business climate of the Commonwealth of Pennsylvania, a matter of great and continuing importance to the Chamber, the interpretation ultimately to be given to the basic seniority provisions now before the Court for construction will have a vital and widespread effect on the formulation of future policies in matters concerning collective bargaining by the Chamber and its members and in the manner in which employer-members of the Chamber will conduct themselves during the lives of current labor contracts which contain identieal or similar provisions to those present here.

### **Questions Presented**

- (a) If in good faith an employer which operates several plants in widely separated areas of the country closes one plant and terminates the employment of the employees who

were employed at the closed plant simultaneously with the expiration of the existing collective bargaining agreement between the employer and the collective bargaining agent of said discharged employees, are the rights arising from the seniority provisions of said expired agreement transferable to and enforceable at the other plants of the employer in the absence of any language in the expired agreement that such rights should be so transferable and enforceable and notwithstanding the fact that the employees at the other plants have selected different collective bargaining agents to represent them?

(b) Do seniority rights under a collective bargaining agreement between an employer and the collective bargaining agent of its employees survive the expiration of said agreement and the termination of the employment relationship of said parties?

### **Reasons for Allowance of the Writ**

The Honorable Court is respectfully urged to allow a writ of certiorari in the instant case for the following reasons:

1. The instant decision of the Court of Appeals has by a split decision determined questions of widespread importance potentially involving every employer, collective bargaining agent and employee who are currently parties to a collective bargaining agreement containing seniority provisions similar or identical to those here involved and has thereby fashioned important federal substantive law to be followed and applied in the enforcement and interpretation of fundamental and basic concepts of seniority which has not been, but should be, settled by this Court.

2. The instant decision of the Court of Appeals is in conflict with the decisions of the United States Courts of

Appeals for the Fifth, Sixth and Seventh Circuits, in that it holds that in the absence of any express language manifesting such an intention, seniority rights survive the termination of the employment relationship and the expiration of the collective bargaining agreement from which they stemmed and are transferable to and enforceable at other plants of the employer notwithstanding the fact that the employees of the other plants have selected different collective bargaining agents and are parties to different collective bargaining agreements.

### **ARGUMENT IN SUPPORT OF REASONS**

**1. The instant decision of the Court of Appeals has by a split decision determined questions of widespread importance and has thereby fashioned important federal substantive law to be followed and applied in the enforcement and interpretation of fundamental and basic concepts of seniority which has not been, but should be, settled by this Court.**

A vast proportion of current collective bargaining agreements contain seniority provisions. As noted by the authors of the *1961 Guidebook to Labor Relations*, Commerce Clearing House Inc., at page 62, Par. 307:

“One of the oldest of union objectives, seniority provisions are part of virtually every union contract \* \* \*.”

It may also be noted that an overwhelming number of such seniority clauses include preferential recall provisions which more or less follow the conceptual scheme present in the collective bargaining agreement now before the Court.

As noted above, seniority provisions are among the oldest of union objectives and do not represent a newly con-

ceived development in labor relations. As a review of the intricacy of the provisions here involved will indicate, such clauses presently possess maturity, complexity and comprehensiveness which are the end product of repeated examination of both the substantive content and language which takes place each time the parties sit down to re-negotiate their contract. While many provisions of current collective bargaining agreements may lack verbal completeness and require Courts to undertake a search for implied conditions in order to properly understand the parties' intentions, seniority clauses, as they have developed, leave very little to be determined by implication. The implied conditions which may have once attended the seniority clauses have long since been reduced to writing. In this connection, however, it must be noted that much reliance has been placed on the existence of such implied conditions in the instant opinion. This Court has never passed on the question of whether seniority rights and obligations survive the termination of a collective bargaining agreement or the employment relationship. If such rights and obligations are controlled by the existence of implied conditions, it is essential that it be made clear to parties to collective bargaining agreements that such results will follow even though the contract is silent on the subject.

It is against the almost universal existence of seniority clauses that the impact of the technological revolution which is now taking place in the industrial world must be reflected if a measure of the instant case's importance is to be understood.

The frequency with which employers find it necessary to modernize, relocate and redesign their production facilities is great and increasing daily. It is of the utmost importance

to settle the respective rights and obligations of employers and employees who are currently parties to seniority provisions which are similar or identical to those involved in the instant case. Failure to provide such a resolution will not only have far-reaching repercussions in labor relations, but will result in a multitude of litigation and render even more onerous the already vast difficulties present in adjusting to modern industrial necessities. Literally every employer and employee who are currently parties to collective bargaining agreements are potential litigants. The federal courts have already seen the forerunners of such litigants. On July 10, 1961, the United States District Court for the Eastern District of Michigan, Southern Division, rendered its decision in *Oddie et al. v. Ross Gear and Tool Company, Inc.*, Civil No. 21350 (not officially reported at date of writing). The case involves questions which are almost identical to those now before the Court. After noting that the Court felt "bound by the *Glidden* case" and that there was "nothing within the contract now in force to the contrary", the Court reached a like decision.

**2. In holding as it does, the instant decision of the Court of Appeals is in conflict with the decisions of the United States Court of Appeals for the Fifth, Sixth and Seventh Circuits.**

For many years, the several Courts of Appeals which have had occasion to consider the question have uniformly held that an individual's seniority rights derived from a collective bargaining contract do not survive either the expiration of the contract or the termination of the employment relationship unless bad faith is shown.

Thus, in *System Federation No. 59 of Railway Employees Department of AF of L v. Louisiana and A. Ry. Co.*, 119 F.

2d 509 (C. A., 5th Cir. 1941), after noting that the question before the Court was whether the seniority rights claimed arose out of and existed because of the contract in question and persisted only during its term or whether they continued to exist after it had terminated, the Court stated:

"On this point the authorities are uniform. They settle it that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions. \* \* \* The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with its term.  
\*\*\*"

"The rights accorded plaintiff and its members under the 1929 contract are clear. Under it, any of the persons named who were furloughed during its continuance had a right during the life of the contract, to apply for reinstatement under its terms. After its abrogation that right was lost and reinstatement could not be claimed under its terms, but only under the terms of the company rules."

In *Local Lodge 2040, International Ass'n of Machinists, AFL-CIO v. Servel, Inc.*, 268 F. 2d 692 (C. A., 7th Cir. 1959), cert. denied 361 U. S. 884, the collective bargaining contract, as reported in the Court's opinion, provided *inter alia*:

"Employees, who were laid off, retained their seniority for a period of time ranging from at least 12 months to 24 months, depending upon the amount of their seniority at the time of their layoff".

Certain benefits were available to employees who had requisite seniority. Prior to the expiration of the existing collective bargaining contract, the employer discontinued its operations at the plant in question and advised the employees that their employment was permanently terminated. Thereafter, employer refused to provide the em-

ployees with any of the benefits called for by the contract. Certain named employees brought suit against the employer contending "that when the employees were permanently laid off by Servel during the course of its discontinuance of its manufacturing operations that they then achieved the status of laid-off employees with two years' seniority from the time of the layoff as provided in the agreement."

In disposing of such contentions, the Court wrote at page 698 of its Opinion:

"Contrary to Appellant's contention we find nothing in the agreement providing for a permanent layoff status to those employees or giving vested rights to seniority for two years following their layoff. Seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence, and the right of seniority is not inconsistent with right of an employer to discharge its employee."

The importance of the instant case would be greatly lessened if the only inconsistency to be encountered was that which exists among the several Circuits of the Courts of Appeals. Of far greater significance is the fact that the instant decision is inconsistent with the basic concept of exclusive representation by a duly selected bargaining agent within a *defined bargaining unit*.

The instant decision has, without discussion of the issue, merged several separately defined bargaining units into one super unit notwithstanding the fact that, in accordance with their guaranteed right to do so, the employees in each of the bargaining units have selected different exclusive bargaining representatives. While separately defined bargaining units form the basis for the selection of each

group's exclusive bargaining representative, the instant decision holds that the functional existence of such separate bargaining units is irrelevant when determining the individual seniority rights of discharged employees. Had the employer done that which the opinion holds the employees were entitled to have done, it would have breached the contract in force with the exclusive bargaining agent of the employees at the Bethlehem plant by attempting to superimpose the terms of the Elmhurst contract on the Bethlehem workers. An employer is not free to modify the contract of one bargaining unit in order to recognize seniority rights which may be found by implication to have survived the termination of the employment relationship and the expiration of a labor contract which was formerly in force in some other bargaining unit. In short, under the rationale of the instant decision, an employer may elect to breach the implied individual rights of discharged employees or to breach the express terms of a labor agreement which is in effect with some other bargaining unit, but circumstances will not permit compliance with all of his obligations. The decision has introduced a dual standard which requires a close examination of the bargaining unit on one hand, but which totally disregards it on the other. While such a procedure might prove workable if the requisite uniformity in contracts and collective bargaining representatives were always present, it can hardly be employed if the workers in each separately defined bargaining unit are to continue to be permitted to select their own exclusive bargaining representative and to negotiate their own contract.

Inherent in the concept of an exclusive bargaining agent is the fact that certain rights of individual workers must yield to the necessities of modern collective bargaining.

Everyone concedes that such individual rights must yield if the bargaining agent modifies or eliminates them by agreement: *Elder v. New York Cent. R. Co.*, 152 F. 2d 361 (C. A., 6th Cir., 1945). It is suggested that the same reasons which require individual seniority rights to yield to freedom of bargaining dictate that they also yield to the concept of separate bargaining units and the right of each unit to select its own bargaining representative.

### CONCLUSION

For the foregoing reasons, Petitioner's petition for writ of certiorari should be granted.

Dated: July 24th, 1961.

Respectfully submitted,

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OCT 9 1961

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1961

Docket No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation, Petitioner,

AGAINST

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS AND MARCELLE KREISCHER,  
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE  
NATIONAL ASSOCIATION OF MARGARINE MANU-  
FACTURERS (AMICUS CURIAE ON BEHALF OF  
PETITIONER).

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1961

Docket No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation, *Petitioner*,

AGAINST

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS AND MARCELLE KREISCHER  
*Respondents.*

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF  
THE NATIONAL ASSOCIATION OF MARGARINE  
MANUFACTURERS AS AMICUS CURIAE.

To the Honorable Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:

The National Association of Margarine Manufacturers hereby respectfully moves for leave to file a brief, appended hereto, as *amicus curiae*, in support of

the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner has consented to the filing of this brief *amicus curiae*. Respondent has refused to consent.

The National Association of Margarine Manufacturers is a nonprofit trade association organized under the laws of the State of Illinois. Its members include a substantial number of the manufacturers of margarine which is produced and sold through the channels of interstate and intrastate commerce. Many of its members engage in multi-state operations, having one or more manufacturing plants located throughout the United States. One of the principal purposes of the Association is to express the views of its members with respect to matters of mutual interest concerning the operations of the Federal and state governments. This includes judicial decisions affecting the industry.

The decision of the United States Court of Appeals is of direct concern to the members of the Association. They are keenly interested in problems of labor and management, including the making of employment contracts and collective agreements through the bargaining process.

The dispute in the case at bar centers around the scope of the seniority provisions of a particular collective bargaining agreement made between petitioner and General Warehousemen's Union Local 852 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The issues are whether those rights of seniority (1) survived the termination of the collective bargaining agreement and the employment relationship between petitioner and

the respondents and (2) were transferrable to another plant of the petitioner at which its employees are represented by another Union.

The Association feels that the decision of the Court of Appeals will have an adverse effect upon the collective bargaining process wherever used in this country in the resolution of conflicts between management and labor. This is true because the decision will encourage employees to disregard collective bargaining agreements made on their behalf by their union representatives.

The seniority provisions in issue are not unique. Similar seniority provisions are widely employed throughout the United States. But other types of seniority provisions are also used in other collective bargaining agreements in this country. There is no common industry practice as to use of a seniority system. Each collective bargaining agreement is tailored to a particular case, and they differ widely.

The Association feels that, in considering the petition for a writ of certiorari, the Court should be apprised of the wide-spread adverse impact which will result if the decision of the Court of Appeals is allowed to stand. The petitioner and the respondents are concerned only with the outcome of the special controversy between them as to whether the petitioner breached the particular collective bargaining agreement with the union—as to which the respondents seek damages. The National Association of Margarine Manufacturers does not believe that the nation-wide adverse effect of the decision of the Court of Appeals will be adequately presented by the parties. The radical effect of the decision of the Court of Appeals in

this case will extend far beyond its effect in settling the rights of the immediate parties involved. The Association, therefore, asks leave to file herein the annexed brief *amicus curiae*.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation, *Petitioner*,

AGAINST

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS AND MARCELLE KREISCHER,  
*Respondents.*

—  
**BRIEF OF THE NATIONAL ASSOCIATION OF MARGARINE MANUFACTURERS (AMICUS CURIAE ON BEHALF OF PETITIONER)**

—  
**INTRODUCTION**

The National Association of Margarine Manufacturers is a national, nonprofit trade association. Many of its members manufacture other products as well as margarine. A substantial number of its members engage in multi-state operations and have manufacturing plants in more than one state. Also, from time to time, its members change their methods of operation by closing down one plant and by transferring operations to another existing plant or to new plants opened in new areas, or by transferring a segment of the business of a plant to a new or existing plant.

One of the primary concerns of the members of the Association is the maintenance of good relations with

their employees. The members of the Association have an immediate interest in the promotion of the collective bargaining process as a means of arriving at agreements affecting employee-employer relations.

One of the purposes of the Association is the articulation of the concern of its members in matters as to which there is a common interest. Nowhere is this interest more direct than in the field of labor relations, particularly as it relates to the collective bargaining process as a means of providing stable labor conditions. The use of varied types of seniority provisions in collective bargaining agreements—tailored to fit particular needs—is common among the business community of the nation of which the members of the Association form an integral part. If this collective bargaining process—a bulwark of our economy—is to survive, it is essential that both parties to such agreements should abide by decisions reflected in such agreements.

Because the Association perceives in the decision of the Court of Appeals an adverse impact upon the integrity of the collective bargaining process which extends far beyond the vital rights of the petitioner in the case at bar, the Association respectfully submits this brief.

The decision of the Court of Appeals, in effect, tells the respondents that they do not have to abide by the collective bargaining agreement involved in the case at bar but, instead, that they may sue the petitioner for an alleged breach of an implied provision which admittedly is not in the express terms of the agreement. Moreover the implied provision read into the agreement by the Court of Appeals is at variance with the

prior conduct of the parties, and is not supported by any general practice in the industry in view of the wide variability of seniority provisions employed in contracts of this type. The decision, unless reversed, will breed further litigation by encouraging other employees likewise to disregard their collective bargaining agreements as written and seek to rely upon still other "implied" provisions if they can convince other courts, as they did the Court of Appeals in the case at bar, that such implied provisions are "humane" or "rational."

Already, the decision of the Court of Appeals has influenced another court in a different part of the country. On July 5, 1961, Judge Fred W. Kaess of the United States District Court for the Eastern District of Michigan, Southern Division, in *Oddie v. Ross Gear and Tool Company, Inc.* (Civil No. 21350, Unreported, see 30 Law Weekly 2031), stated that he felt bound by the decision of the Court of Appeals herein. He thus ignored a decision of the United States Court of Appeals for the Sixth Circuit holding that rights created by a collective bargaining agreement do not extend beyond its termination. *Elder v. New York Cent. R. Co.* (CCA 6, 1945), 152 F. 2d 361, 364. Although there seem to be some factual distinctions between the two cases, the important point for this Court to consider is that the Michigan Judge stated that he felt bound by the decision of the Court of Appeals in the case at bar.<sup>1</sup>

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<sup>1</sup> Both the Court of Appeals and the Michigan District Court apparently felt that their decisions were, in some way, justified because of their conclusion that the seniority rights of the employees respectively involved were "vested." This is the essence of what Dean Roscoe Pound calls "mechanical jurisprudence." He has

The Association files this brief in support of the petition for a writ of certiorari because it believes that it is incompatible with the broad national public interest to encourage the judicial reformation of collective bargaining agreements as was done by the Court of Appeals in the case at bar. It is in the interest of employers and employees everywhere for the courts to encourage the collective bargaining process, involving, as it does, the reaching of agreements by compromise with the understanding that the parties will abide by the agreements when reached.

## I.

**Unless Reversed, the Decision of the Court of Appeals Will Upset Existing Agreements Between Employers and Employees Respecting Seniority Provisions and Will Frustrate Future Efforts to Make Such Agreements.**

The decision of the Court of Appeals has shocked the business community by casting a litigious cloud over many existing labor agreements made through the collective bargaining process and injecting an element of uncertainty into such future labor agreements. The effect of the decision is to frustrate the attempt of petitioner—and of employers generally—to make a definitive agreement with its employees restricted to employment at a specific plant.

**It has been repeatedly pointed out that collective bargaining requires that the parties involved deal with**

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stated that, "Current decisions and discussions are full of such solving words: estoppel, malice, privity, implied, intention of the testator, vested, and contingent—when we arrive at these we are assumed to be at the end of our juristic search. Like Habib in the Arabian Nights, we wave aloft our scimitar and pronounce the talismanic word." Pound, *Mechanical Jurisprudence*, reprinted from 8 Columbia Law Review 605 (1908) in "Landmarks of Law", Harper Brothers (1960), page 101, at page 111.

each other with an open and fair mind and, in good faith, endeavor to overcome obstacles or difficulties existing between them so that employment relations may be stabilized and obstructions to the free flow of commerce prevented. *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332 (1938); *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 (1938); *H. J. Heinz Co. v. National Labor Relations Board*, 311 U.S. 514 (1941).

In *Rapid Roller Co. v. National Labor Relations Board* (CCA 7, 1942), 126 F. 2d 452, 459, the Court aptly pointed out that

Edmund Burke once said: "All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter."

An essential element of the collective bargaining process is that decisions once made and reflected in such agreements shall, in good faith, govern the relations of the parties thereafter.

With respect to seniority provisions, wide variations exist in seniority systems used in this country. See *Aeronautical Industrial District Lodge 727 v. Campbell et al.*, 337 U.S. 521, 526-27 (1949). Judge Edmund L. Palmieri of the United States District Court for the Southern District of New York, whose decision was reversed by the Court of Appeals in the case at bar, took careful note of the variabilities in seniority systems prevalent in the United States. He pointed out that not only are different systems employed with respect to the unit to be covered, but that also there are different systems dealing with the issue of interplant seniority. The Court of Appeals gave no considera-

tion at all to this crucial circumstance. Instead, that Court held that there was an implied condition of the collective bargaining agreement that seniority rights created by the contract, and specified in the contract to be applicable to employees at the Elmhurst plant, survived the termination date of the agreement and of the employment by petitioner or respondents. This conclusion was reached by the Court of Appeals in the admitted absence of any specific provision of the contract to such effect and in the face of language in the agreement specifically limiting the applicability of the bargaining agreement to the Elmhurst plant.

Relations between management and labor are premised upon an atmosphere of compromise when collectively they bargain each with the other for the important emblems of their relationship. Collective bargaining is directed toward the end of stabilizing the employment relation. Clearly, in the case at bar, the Court of Appeals has swept aside the agreement made by the parties and has encouraged the respondents, and others similarly situated, to pursue rights not specified by the agreement. This is not only destructive to stability in employment relations but also obstructs the free flow of commerce contrary to the national labor policy.

## II.

**The Court of Appeals, Under the Guise of Construing the Collective Bargaining Agreement Herein, Actually Substituted Its Judgment As To What the Parties To the Agreement Should Have Provided As To the Preservation and Transferability of Seniority Rights.**

The Trial Court correctly held that the instant agreement meant what it said—that it was conditioned upon the continuance of the collective bargaining agreement and the employment of respondents at Elm-

hurst. When this agreement and relationship of employment were lawfully terminated in good faith—and this much is conceded by respondents—, the seniority rights of respondents ceased to exist and they were not transferable, as a matter of law, to petitioner's new operation at Bethlehem. The Court of Appeals has not only eviscerated from the collective bargaining agreement the specific and clear limitation of its scope —the preamble of which stated that the agreement was made by the petitioner

for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York

—but also the Court of Appeals frankly interpolated into the agreement what is considered “the more rational, not to say humane, construction of [the] contract” which appealed to the subjective judgment of that Court.

It clearly made a judicial reformation of the contract so as to make the agreement conform to what that Court felt the parties should have done. The Court of Appeals thus ignored the jurisprudentially sound doctrine that the duty of a court is to construe contracts as written and not to make new contracts for the parties thereby binding them to new terms and obligations to which they have not bound themselves. *Lanusse v. Barker*, 3 Wheat. (16 U.S.) 101 (1818); *Memphis & L. R.R. Co. v. Southern Express Co.*, 117 U.S. 1 (1886); *Osborn v. Nicholson et al.*, 13 Wall. (80 U.S.) 654 (1871); *Green County v. Quinlan*, 211 U.S. 582 (1909); *Sheets v. Selden*, 7 Wall. (74 U.S.) 416 (1868); *Calmar S.S. Corp. v. Scott*, 345 U.S. 427 (1953).

It is essential to the business community that these fundamental principles shall continue to govern commercial intercourse. Neither abstract justice nor the most extreme extension of any rule of liberal construction justified the Court of Appeals in interpolating into the contract an implied provision for the survival and transferability of seniority rights after the collective bargaining agreement and individual employment contracts of the respondents were admittedly lawfully terminated in good faith.

Professor (now Solicitor General) Archibald Cox has rightly pointed out that a collective bargaining agreement essentially is a form of contract and that it is entitled to enforcement by the courts and that

A collective bargaining agreement does not imply a promise that the employer will not deprive the union and the employees of its benefits by closing an obsolete plant or dropping an unprofitable line of commerce. (Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 31.)

This Court has also held that it will not stretch the language of a contract so as to read into it provisions which the parties have not included. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). Clearly, when a collective bargaining agreement, as in the case at bar, defines or limits the rights and obligations of the parties, it controls. No discretion is allowed to any court to weigh and apply equities in conflict with that contract, although such treatment may appeal to the "rational" and "humane" conceptions of the individual judges.

Seniority is contractual in nature and is not an inherent or natural or constitutional right. *Colbert v.*

*Brotherhood of R. R. Trainmen* (CCA 9, 1953), 206 F. 2d 9, 13, cert. den., 346 U.S. 931, rehearing den., 347 U.S. 924. "Accordingly, it is the almost universal rule that upon the termination of the instrument of their creation, seniority rights are at an end." (*Termination of Collective Bargaining Agreements—Survival of Earned Rights*, 54 N.W. U.L. Rev. 646, 649 (1959).)

There is no doubt that the actual collective bargaining agreement involved in the case at bar was, as held by the Trial Judge, limited expressly to Elmhurst—just as many such contracts of a multi-plant company are limited to one plant or, even, to one department of a plant.

The Court of Appeals swept aside the Trial Court's determination on this dispositive point and suggested that the recital in the preamble of the agreement that it was made for and on behalf of the petitioner's facilities located at Corona Avenue and 94th Street, Elmhurst, was a mere recital "analogous to the *descriptio personae* familiar to the law." Likewise, the Court of Appeals suggested that, if this language meant what the Trial Court said it meant, difficulties would arise in the event the plant were removed from 94th Street to 93rd Street in Elmhurst. If such a removal happened, reasoned the Court of Appeals, ". . . an entire structure of valuable legal rights would tumble down."

It is plain from what the Court of Appeals said that it thus rejected the Trial Court's judgment in part by indulging in suppositions as to how the collective bargaining agreement would have been applied in a hypothetical situation not before that Court.

This Court has declared that " \* \* \* Courts deal with the cases upon the basis of the facts disclosed, never

with non-existent and assumed circumstances." See *Electric Bond and Share Company v. Securities & Exchange Comm'n*, 303 U.S. 419, 443 (1938); *Chicago Board of Trade v. Olson*, 262 U.S. 1, 42 (1923). Here, as in *First National Bank v. Reach*, 301 U.S. 435, 438 (1937), it may be said that " \* \* \* Hypothetical situations are laid before us, and the argument is pressed that the definition will breed absurdity if applied to this one of them or that. We refuse to be led away from the limitations of the concrete case \* \* \* ."

### III.

#### **The Decision of the Court of Appeals Is Contrary to the Policy of Our National Labor Laws**

The decision of the Court of Appeals unsettles previously well established principles upon which companies, unions, and employees have come to rely in the conduct of their interrelated affairs. It brings into question the statutory scheme of collective bargaining, itself, potentially affects every collective bargaining relationship in the country, and tends to disrupt rather than to effectuate the policy of our National Labor Laws as manifested in the Labor Management Relations Act, 1947, as amended (61 Stat. 136; 29 U.S.C. 141 *et seq.*). A fundamental part of this congressional policy is to encourage the practice and procedure of collective bargaining. In deciding that respondents were entitled to employment at the new Bethlehem plant, with seniority in accordance with the terms of the expired collective bargaining agreement covering their employment at another plant at Elmhurst which was closed, the Court of Appeals also swept aside procedures developed by the National Labor Relations Board in carrying out its statutory responsibility to

investigate and determine questions of employee representation and to enforce statutory ground rules governing the collective bargaining process. *Ibid.*, 29 U.S.C. 151, 157, 158(a)(1) and (5), 158(b)(1) and (3), 159(a) and (c).

#### **CONCLUSION**

The circumstances which make the case at bar so important to the business community at large, therefore, are that, if allowed to stand, the decision of the Court of Appeals (1) will cast a legal cloud over numerous outstanding labor contracts containing seniority provisions limited in scope to particular plants, thereby encouraging litigation; and (2) the decision will create uncertainty in the collective bargaining process in the future since, no matter how explicit may be the labor agreement as to its geographical applicability, neither party can be certain that its scope will not thereafter be changed by the courts according to their judicial conception of how the contract should have been written.

Today, both labor and management are sophisticated in the negotiation of collective bargaining agreements. Sometimes a collective bargaining agreement, like a commercial contract in general, does not spell out all of the possible matters which could be covered by that agreement; and, at other times, the parties to a collective bargaining agreement are unable to compose their differences on a particular point by compromise and deliberately omit it from the agreement. The whole process of collective bargaining will inevitably break down if, after such agreements are reached, the courts substitute their views as to what is "humane" or "rational" for what the parties actually provided.

To paraphrase the words of Mr. Justice Frankfurter, when discussing the appropriate function of a court in construing statutes, a judge must not use the words of a collective bargaining agreement as empty vessels into which he can pour anything he will—"his caprices, fixed notions, even statesmanlike beliefs in a particular policy", and, likewise, the collective bargaining agreement being construed must not be read by way of creation. (Frankfurter, *Some Reflections on the Reading of Statutes*, reprinted from 2 Record 213 (1947) in "Landmarks of Law", Harper Bros. (1960), 210, at pages 212, 216.)

It is desirable from both the standpoint of management and of labor for representatives of each to be able to make such labor agreements as they deem proper to meet their particular situations. The decision of the Court of Appeals strikes at the heart of this concept. This Court should, therefore, grant the petition for certiorari and consider the issues of such widespread public importance thereby presented.

Respectfully submitted,

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Office-Supreme Court, U.S.

FILED

Oct 9,  
JUL 24' 1961

JAMES R. BROWNING, Clerk

No. 242

IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1961**

On Petition For Writ of Certiorari to The United States  
Court of Appeals For The Second Circuit

THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION,

Petitioner,

vs.

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS AND MAR-  
CELLE KREISCHER,

Respondents.

**MOTION OF OHIO CHAMBER OF COMMERCE FOR  
LEAVE TO FILE BRIEF AS AMICUS CURIAE**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 196~~0~~

No. ~~242~~

THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION,

Petitioner,

vs.

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS AND MAR-  
CELLE KREISCHER,

Respondents.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE**

Ohio Chamber of Commerce, a corporation not for profit under the laws of the State of Ohio, respectfully moves the Court for leave to file a brief amicus curiae. The consent of the attorneys for the petitioner herein has been obtained, but the attorneys for the respondents herein refuse to consent to the filing of a brief by Ohio Chamber of Commerce as amicus curiae.

The applicant, Ohio Chamber of Commerce, has an interest in this case in that it is a membership organization composed of 3,600 members, a substantial number of which are employers of labor having collective bargaining contracts with labor organizations, which contracts almost invariably contain terms relative to seniority rights essentially identical with those involved in the contract which is the subject of this case. Further, Ohio Chamber of Commerce has as one of its objectives, the preserving for its members and others who might become attracted to the State of Ohio, conditions of employment favorable both to management and to labor. This includes the constant encouragement of the location and relocation of new industrial plants and other business installations within the State of Ohio. Thus, in the process of such location and relocation, employers with collective bargaining contracts encounter the same questions which are presented in the instant case. The decision of the Court of Appeals on these questions, if permitted to stand, would seriously interfere with the freedom of industrial movement which the economy requires and the applicant seeks to promote. The questions are: 1.) whether, in the absence of express provision to the contrary, the standard seniority provisions of collective bargaining contracts vest in the employees rights which survive and extend beyond the expiration of such contracts between employers and employees as the Court of Appeals held, and 2.) assuming *arguendo* that seniority rights may survive the effective life of a collective bargaining contract, do such rights survive the termination of employment at an abandoned plant and entitle the discharged and formerly employed person to seniority in employment at a new plant in a distant location, as the decision of the Court of Appeals implies.

The brief of the petitioner herein in the Court of Appeals discusses both of these questions; but the discussion of the second question is inadequate in that it does not consider what the contemplation of the parties must have been at the time of contracting, in the use of the word "layoff". Specifically, it does not point out that the parties in the use of the word "layoff" in connection with the granting of seniority rights, could not have contemplated a termination of employment at one location, coupled with the commencement of operations at a distant location, because such a course of events would entail the uprooting of families from their homes, their churches, their schools, their lodges, etc., and the commencement of life anew in a strange community. "Layoff" certainly has a restricted meaning, which does not embrace every termination of employment other than discharge for cause; and it seems inconceivable that termination under the circumstances of this case, as herein described, could have been thought of as a "layoff" by the contracting parties.

The applicant has no reason to believe that this argument will be expanded upon in petitioner's brief in this Court. If this Court accepts this argument, the decision of the Court of Appeals must be reversed.

Since the proceeding draws into question the constitutionality of the Act of July 28, 1953, 67 Stat. 226, Title 28 USC Section 171, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a part, it is noted that Title 28 USC Section 2403 may be applicable.

No Court of the United States as defined by Title 28 USC Section 451 has, pursuant to Title 28 USC Section

2403, certified to the Attorney General the fact that the constitutionality of such Act of the Congress has been drawn in question.

Dated at Columbus, Ohio, this twenty-first day of July, 1961.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

CLERK

OCTOBER TERM, 1961

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, a Foreign Corporation,

*Petitioner,*

against

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS and MARCELLE KREISCHER,  
*Respondents.*

On Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit.

Motion of California Manufacturers Association for  
Leave to File Brief as Amicus Curiae and Brief  
of Amicus Curiae.

HILL, FARRER & BURRILL,  
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*Respondents.*

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On Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit.

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**MOTION FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE.**

---

The California Manufacturers Association respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorneys for the petitioner herein has been obtained but the attorneys for the respondents herein refused to consent to the filing of a brief by the California Manufacturers Association as *amicus curiae*.

The applicant, the California Manufacturers Association, has an interest in this case in that of its approximately 1100 member companies who employ approximately 65% of the California manufacturing labor force many are parties to collective bargaining agreements that are very similar to the Agreement that exists between the parties in this action.

The decision of the Court of Appeals for the Second Circuit is of particular and vital importance to members of the California Manufacturers Association in that it adversely affects the stability of labor-management relations and re-interprets, contrary to the intention of the parties, similar contractual language existing in the collective bargaining agreements of many of its members. The decision of the court below creates a substantive law which is national in its scope and will, therefore, have a detrimental effect upon the sound and efficient operations of the members of this Association and it is clearly at odds with the reasonable expectations of parties to collective bargaining agreements. Moreover, the action of the Circuit Court is in conflict with and in derogation of the rights afforded employees by the National Labor-Management Relations Act.

The California Manufacturers Association does not know at this time what arguments and authorities the petitioner will present on the merits of the case as contended for by it, but, based upon the briefs of the parties in the court below, the Association believes that the arguments to be presented by the Association will not be merely a duplication of but will be supplemental and in addition to arguments presented by the petitioner and will further reflect upon the collective bargaining process experienced by the Association's members.

Dated at Los Angeles, California this 21st day of July, 1961.

HILL, FARRER & BURRILL,  
CARL M. GOULD,  
STANLEY E. TOBIN,

*Counsel for Amicus Curiae.*

IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1961

No. .....

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
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*Respondents.*

---

On Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit.

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**BRIEF OF CALIFORNIA MANUFACTURERS  
ASSOCIATION AS AMICUS CURIAE.**

---

**Statement.**

This brief is filed on behalf of California Manufacturers Association (hereinafter sometimes called the "Association"), legally organized pursuant to the laws of the State of California and representing approximately 1100 member companies, employing 65% of the California manufacturing labor force.

### **Reasons for Allowance of the Writ.**

The petition for writ of certiorari should be granted because:

1. The Court of Appeals by its decision in this case, has extended the scope and effect of seniority rights beyond that intended by the parties.
2. The decision of the Court of Appeals is not only irreconcilable with opinions from other United States Courts of Appeal but is in conflict with the collective bargaining process and labor-management practice.
3. The decision of the Court of Appeals creates a federal substantive law, of widespread importance, which would upset labor-management stability and unduly burden employers throughout the country.
4. The decision of the Court of Appeals in this case is in conflict with and in derogation of the national labor policy as expressed in the National Labor-Management Relations Act.

## ARGUMENT IN SUPPORT OF REASONS.

### I.

#### Seniority Rights Are Limited by the Collective Bargaining Agreement and These Rights Can Be Added to and Extended Only by the Parties.

The court below reasoned that seniority rights are to be treated *in pari materia* with pension or retired pay rights and that all these types of rights are "vested." *Zdanok v. Glidden Company*, 288 F. 2d 99, 103. That holding flies in the face not only of sound contract law but of the collective bargaining process as well. To begin with, seniority rights, to the extent of their proper scope (and only to that extent) are, like pension rights, admittedly "earned." But the analogy ends at that point. By its very nature, a pension guarantee is an additional monetary consideration for *past* services. Seniority credits, on the other hand, are accorded to the extent agreed and expressed in the employment contract based upon the tacit assumption that the employment relationship will continue in the *future*; and such a relationship presumes actual service within the scope of and contingent upon an existing and continuing contractual arrangement. Seniority rights are neither a guarantee that the employment relationship will continue nor a substitution in the event the relationship ceases.

By deeming seniority rights "vested," the Circuit Court of Appeals has created rights and obligations going far beyond those that the parties to the agreement favored or imposed upon themselves. Even assuming, *arguendo*, that the termination of the Collective Bargaining Agreement did not automatically extin-

guish the specified seniority rights of the Agreement, to what extent are those rights preserved and to what extent are they presently effective and operative? Whatever rights the plaintiffs had emanate from and are limited by the Agreement. Addressing itself to the nature and scope of seniority rights, the Court of Appeals for the Sixth Circuit, in *Elder v. New York Cent. R. Co.*, 152 F. 2d 361, 364 (1945), stated:

“The right, however, is not inherent. It must stem either from a statute or a lawful administrative regulation made pursuant thereto, or from a contract between employer and employee, or from a collective bargaining agreement between employees and their employer. In the absence of statute, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment. In the instant case, the appellant rests upon no right created by statute, but solely upon a collective bargaining agreement, made between the chosen representative of the workers and the employer \* \* \* *His individual seniority rights were both created and limited by the bargain which was made for and was binding upon all employees for whom it was made.*” (Emphasis added.)

That such rights are limited by a reasonable construction of the agreement from which they are derived has been repeatedly expressed by federal courts and by ar-

bitration boards that have recently been confronted with the same or similar questions. See

*Metal Polishers Local 44 v. Viking Employment Co.*, 278 F. 2d 142 (Third Cir. 1960);

*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

See also:

*Jones & Laughlin Steel Corp.*, 20 L. A. 797, 799 (1953).

There is nothing in the Agreement that permits these former employees "to follow their work." The Agreement, reasonably construed, covered the Elmhurst operations and its efficacy was contingent upon continual operations in that area. The court below indicated that such a restricted construction of the collective bargaining agreement would be illogical since it would necessitate that seniority rights could be curtailed if the plant were moved but a city block away. 288 F. 2d at 103-104. The answer to that assertion is obvious. Any such *de minimis* change in contract conditions would almost certainly be treated by courts and others in light of equitable principles. Since in such circumstances there would seldom be a material change in the position or the relationship of the parties, all such rights and obligations would remain intact and in effect. But the movement of a plant and its facilities a distance of over 100 miles, as in this case, is indeed a substantial change going to the very foundation of the collective bargaining agreement and the process that brought it about.

Such a movement not only affects the source, supply and type of personnel available to the employer but

is intrinsically bound up with the reasonable expectations of the employees as well. Almost by necessity, the employer's method of operation, its production schedules, its proximity to markets and materials, its cost factors and analyses, are drastically changed by the type of movement involved in this case. These considerations are the basic ingredients of collective bargaining negotiations and the bargaining process. It would do violence to labor-management relations to expand the area of understanding and impose obligations that at least one party, with good cause and sufficient justification, would hardly have consented to or failed to consider.

Had the parties to this Agreement been willing to expand the scope and effect of seniority rights, despite the possible adverse results to the Employer, familiar contract language was readily available and could easily have been inserted. As the District Court noted at some length in its opinion, such provisions "are not uncommon," and United States Department of Labor Bulletins have for a number of years explained the various types of provisions and techniques that are utilized in labor contracts in regard to seniority rights. A specific but significantly different provision is utilized when seniority rights are intended to be transferred in the event of a geographic relocation of the employer's operations. *Zdanok v. Glidden Company*, 185 Fed. Supp. 441, 447-49. A failure to insert that or a similar provision underscores the fact that the parties never intended to adopt or approve one of the broadest possible seniority guarantees available.

The plaintiffs have stated and the court below seemed to suggest that the failure to adopt explicit and ap-

plicable provision for the transference of seniority rights is because "plant relocation is not a common occurrence." (See Pltf. Br. to the Court of Appeals, pp. 17-18.) Such an argument has no support in fact. Particularly since World War II, literally thousands of firms have relocated their operations. No responsible union official and hardly any employee or employer can reasonably remain oblivious to the great efflux and influx of manufacturing operations not only from the north to the south but within and throughout the nation and even beyond our borders. Indeed, this prevalent practice is one of the most significant factors in the national economy. It is further exemplified by the increasing number of union agreements that contain severance pay provisions,<sup>1</sup> many of which refer to termination resulting from relocation or are *clearly* broad enough so as to include that situation.<sup>2</sup> On occasion the question as to whether a geographic relocation warrants severance pay is a bitterly contested issue in contract negotiations between the parties.<sup>3</sup> Patently, in labor relations throughout the country vir-

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<sup>1</sup>In 1959 over 150,000 union workers in manufacturing industries in California alone were covered by severance pay provisions. "California Industrial Relations Reports," California Department of Industrial Relations, Division of Labor Statistics & Research, April, 1960, No. 20, pp. 5, 28.

<sup>2</sup>*Id.* at pp. 8-27; See e.g., *Princeton Worsted Mills*, 25 L. A. 587 (1955); *Deep Rock Oil Corp.*, 20 L. A. 865 (1953); *Kaiser-Frazer Corp.*, 12 L. A. 841 (1949).

<sup>3</sup>In a recent arbitration, Rotogravure Employers of Los Angeles and Los Angeles Newspaper Web Pressmen's Union No. 18, I.P.P. and A.U. of N.A. (opinion to be published), one of the principal issues in dispute in the determination of a new contract was whether a severance pay provision should be included, and more particularly, whether such a provision should provide for severance pay in case of a relocation of a plant beyond the jurisdiction of the Union.

tually everyone is cognizant of the relocation problem. The relocation contingency is clearly and reasonably a foreseeable one.

The seniority provisions of the instant Agreement do not include relocation seniority guarantees, "and it is unlikely that it did not occur to the negotiators at the time the agreement was executed that the Company might" relocate in another area, and as an arbitration board stated in an analogous situation, "The Union may not in this proceeding attempt to renegotiate that provision." *H. Boker & Co., Inc.*, 12 L.A. 608, 612 (1949). Similarly, a federal court should not add to a collective bargaining agreement a term or provision that the parties themselves did not see fit to approve.

Contrary to the position of the Circuit Court (288 F. 2d at 104), this employer and other employers similarly situated might well be detrimentally affected. Employers have sound and justifiable reasons for limiting seniority rights to the existing locations of their plants. Aside from the reasons touched upon above, other adverse results to employers would follow if the Circuit Court's ruling in this case is to become or remain effective.

Many employers in California and elsewhere have multiple-plant operations wherein particular plants are widely scattered throughout the state and nation. Often, each plant has its own bargaining agreement with separate and different seniority provisions. Should such an employer be compelled to permit employees in one plant to retain seniority rights in case of consolidation or merger with facilities of another plant in an-

other location, it would not only lead to labor-management chaos but would virtually foreclose the employer from taking an action that would lead to a sound and efficient operation. Moreover, the federal substantive rule which the Circuit Court adopted would have a further detrimental effect upon employers who relocate their plants in different areas, particularly as a result of the tax advantages and other concessions accorded them by the new community. Usually these concessions are granted to an employer by the new community based upon the premise that meaningful employment opportunities will be made available to local residents. Of course, the ruling of the Circuit Court in this case will negate such a premise and often nullify an advantageous opportunity. And, at times, employers, for reasons of efficiency and economy, transfer their production operations to foreign countries. In such cases, the laws of a foreign nation may effectively prevent American citizens from "following their work." Certainly, in these circumstances, few employers would bind themselves by such burdensome seniority right provisions.

Since the possibility of a geographic relocation was reasonably foreseeable, the court below in effect ignored the intent of the parties in reconstructing the Agreement. No evidence was shown indicating that the parties intended to transfer seniority rights in these circumstances. In this regard the opinion of the arbitration board in *Jones & Laughlin Steel Corp.*, 20 L.A. 797, 799 (1953) is pertinent. Addressing itself to the extension of seniority rights from one plant to another, and from one company to another, the board stated:

"We find absolutely no basis for such an interpretation of the Agreement. When it is considered that seniority has no existence apart from contract, and that in the ordinary course of events seniority extends only for the duration of employment with a particular employer, it is clear that any interpretation which constitutes a departure from this norm should be based only upon the clearest evidence that such departure was actually intended by the parties. We find no such evidence in the record before us."

Moreover, the District Court, the trier of fact, found that if there was any intent regarding seniority rights, other than that expressed in the Agreement, it was that the parties did not intend to extend seniority rights beyond the location of the existing plant. Even assuming there exists ambiguity in the Collective Bargaining Agreement, the District Court in effect resolved that ambiguity based upon the evidence before it. The question of intent is properly one for the trial court to decide and its decision should not ordinarily be overturned.

## II.

### **The Decision of the Court of Appeals Upsets the Stability of the Collective Bargaining Process.**

The effect of the decision of the Court of Appeals for the Second Circuit is to create a new federal substantive law in regard to seniority rights. See *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957). In fashioning a body of federal law to enforce and effectuate collective bargaining agreements throughout the country it is incumbent upon a court or

other official body to recognize the realities of labor relations and the collective bargaining process. As indicated, many employer members of this Association have similar seniority right provisions in their collective bargaining agreements; yet few, if any, would consider that these rights extend beyond the present locations of their plants. To ignore the reasonable expectations of parties to such agreements, who act in good faith and in light of labor management practice and precedents, is to fashion a law which is completely out of harmony with and in derogation of the collective bargaining process.

In fashioning a body of federal law in this area Courts should not ignore the already existing "industrial common law." Justice Peters of the California Supreme Court recently discussed with approval the position of Professor Sam Kagel in regard to industrial common law and the intent of the parties. Justice Peters noted that:<sup>4</sup>

"Professor Kagel, an authority in the field of arbitration, has pointed out that the collective bargaining agreement 'is a codification of much of the industrial common law, *i.e.*, the practices of the industry or plant. Some Agreements specifically provide whether or not remaining unrecorded practices are to be recognized as additional and a substantive part of the Agreement.'

"Where the parties have not made such specific provisions then to the extent that the unrecorded

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<sup>4</sup>*Posner v. Grunwald-Marx, Inc.*, 56 Advance California—(June 29, 1961), quoting from a paper given by Professor Kagel to the National Academy of Arbitrators on January 27, 1961, at Santa Monica, California.

industrial common law does not negate or is not inconsistent with the written Agreement it becomes a substantive part of the Agreement for the purpose of interpreting that writing. Thus industrial common law, *i.e.*, practices, are used in the grievance procedure to aid in resolving ambiguities in the written Agreement. But not to add new or contradictory terms to the Agreement.' Thus, the federal rule, at least limited as suggested above, is in conformity with the California cases and results in enforcing the intent of the parties."

In this instance both the intent and the past practice of this Employer and virtually all other employers similarly situated, are contrary to the interpretation given to the Agreement by the Second Circuit. While this Court has not passed upon the question as to the transferability of seniority rights in the wake of a relocation of an employer's plant, it has repeatedly indicated that in moulding a federal common law in this area, the realities of the labor field and past practices should be given special attention. See, *e.g.*, *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953).

### III.

#### **The Court of Appeals' Decision Fails to Recognize the Conflict That Necessarily Results Between the Rule Adopted by It and the Policy of the National Labor-Management Relations Act as Amended.**

In any event the Court of Appeals has acted beyond its jurisdiction. The National Labor-Management Relations Act of 1947, as amended, reflects the policy of Congress that employees in an appropriate unit shall

have the right of self-organization and the right to bargain collectively through their chosen representatives and to participate in the determination of wages, hours and working conditions of their employment. Labor-Management Relations Act, 1947, as amended by Public Law 86-257, 1959. The Act accords the National Labor Relations Board the primary and exclusive jurisdiction to determine whether a collective bargaining unit is an appropriate one. It is for the Board to determine whether the particular provisions of a collective bargaining agreement, such as seniority clauses, will discriminate in favor of one group of employees and against another. In this case the contractual guarantee claimed by the plaintiffs would discriminate against employees in the new location, would vitiate the statutory rights of those new employees and could well result in an unfair labor practice.

The question as to the efficacy and scope of seniority rights directly affects the rights of the new employees in the new location and can only be ruled upon and decided by the National Labor Relations Board. The federal and state courts are pre-empted from determining this issue which is within the exclusive jurisdiction of the National Labor Relations Board. See *San Diego Building Trades Council v. Garman*, 359 U. S. 236 (1959). If the decision of the Court of Appeals is forced upon the Employer and the new employees alike, it is in direct contradiction with and in derogation of the national policy as expressed in the Act.

**Conclusion.**

For the foregoing reasons the petition for writ of certiorari should be granted.

Dated July 21, 1961.

Respectfully submitted,

HILL, FARRER & BURRILL,

CARL M. GOULD,

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*Counsel for Amicus Curiae.*

MOTION FILED JUL 25 1961

Office-Supreme Court, U.S.

FILED

No. 242

OCT 9 1961

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1961

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, A Foreign Corporation,  
*Petitioner,*

against

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS and MARCELLE KREISCHER,  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

**MOTION OF NATIONAL PAINT, VARNISH AND LACQUER  
ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE AND BRIEF OF AMICUS CURIAE**

DANIEL S. RING,  
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Association, Inc.*

No. 242

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1961

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, A Foreign Corporation,  
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against

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*Respondents.*

---

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

---

**MOTION FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE**

---

Now comes the National Paint, Varnish and Lacquer Association, Inc., and respectfully moves the Court for leave to file a brief as amicus curiae in the above entitled cause. While petitioner has consented to the filing of such a brief, the attorney for the respondents herein, has refused to consent to such filing.

The National Paint, Varnish and Lacquer Association, Inc., is a non-profit trade association, incorporated under the laws of Delaware. Its members are manufacturers of paint, varnish and lacquer, and suppliers of raw materials for such products. Its members manufacture in excess of 90 per cent in dollar volume of the paints, varnishes and lacquers produced in the United States.

The National Paint, Varnish and Lacquer Association, Inc., desires that this Court grant the petition sought in the above entitled cause and its interest is limited to the granting of the petition only.

The decision complained of by petitioner in this case has produced widespread confusion among members of the National Paint, Varnish and Lacquer Association, Inc., who are employers, bound by the provisions of the National Labor Relations Act. (Title 29 U.S.C. § 157 et seq.)

The conflict between the decision by the United States Circuit Court of Appeals for the Second Circuit and decisions of the United States Courts of Appeals in the Fifth, Sixth and Seventh Circuits, results in an urgent need for a decision by this Court to resolve such conflict.

The National Paint, Varnish and Lacquer Association, Inc., therefore, wishes to file the attached brief in support of its contention that this Court should examine the questions presented and define for the benefit of all employers coming under the provisions of the National Labor Relations Act a clear rule of conduct so that they may have a definite guide for the discharge of their obligations under the National Labor Relations Act.

**STATEMENT UNDER RULE 33.2(b)**

Since the proceeding draws into question the constitutionality of the Act of July 28, 1953, 67 Stat. 226, Title 28 U.S.C. Section 171, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that Title 28 U.S.C. Section 2403 may be applicable.

No Court of the United States as defined by Title 28 U.S.C. Section 451 has, pursuant to Title 28 U.S.C. Section 2403, certified to the Attorney General the fact that the constitutionality of such Act of the Congress has been drawn in question, so far as is known by the undersigned.

Respectfully presented,

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No. 242

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1961

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
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QUITMAN WILLIAMS and MARCELLE KREISCHER,  
*Respondents.*

---

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

---

**BRIEF OF NATIONAL PAINT, VARNISH AND LACQUER  
ASSOCIATION, INC.**

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This brief is filed on behalf of the National Paint, Varnish and Lacquer Association, Inc., a trade association comprised of manufacturers of paint, varnish and lacquer products. It is incorporated under the laws of the State of Delaware. Its members manufacture more than 90 per cent in dollar volume of paints, varnishes and lacquers produced in the United States.

The vast majority of the members of the Association are employers who are governed by the provisions of the National Labor Relations Act.

The conflict of decisions between the United States Court of Appeals for the Second Circuit<sup>1</sup> and the United States Courts of Appeals in the Fifth,<sup>2</sup> Sixth<sup>3</sup> and Seventh Circuits,<sup>4</sup> results in serious confusion on the part of the members of the National Paint, Varnish and Lacquer Association, Inc., with respect to their obligations under the National Labor Relations Law in collective bargaining matters. The conflict of decisions is adequately set forth in the petition for the writ on Pages 13 to 16.

The National Paint, Varnish and Lacquer Association, Inc., does not wish to take any position on the merits of the case in the event the writ is granted but respectfully submits that its members have a right to know which line of decisions should be observed in the discharge of their obligations under the National Labor Relations Act.

For this reason the National Paint, Varnish and Lacquer Association, Inc., urges that the petition of the Glidden Company, Durkee Famous Foods Division, for a writ of certiorari be granted, and that upon ex-

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<sup>1</sup> Glidden v. Zdanok et al., 288 F. 2d 99.

<sup>2</sup> System Federation No. 59 of Railway Employees v. La. & A. Ry. Co., 119 F. 2d 509, 515 (CA 5th Cir. 1941).

<sup>3</sup> Elder v. N. Y. Central R. R. Co., 152 F. 2d 361, 364 (CA 6th Cir. 1945).

<sup>4</sup> Local Lodge 2040, International Association of Machinists v. Servel, 268 F. 2d 692, 698 (CA 7th Cir. 1959).

amination of the questions presented this Court hand down a clear statement of the law with respect to the issues involved.

Respectfully submitted,

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Association, Inc.*

OCT 9 1961

IN THE

JOHN F. DAVIS, CLERK

# Supreme Court of the United States

OCTOBER TERM, 1961

**No. 242**

THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION, A FOREIGN CORPORATION,  
*Petitioner,*

*vs.*

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS AND MARCELLE  
KREISCHER,

*Respondents.*

MOTION OF ILLINOIS STATE CHAMBER OF COM-  
MERCE FOR LEAVE TO FILE A BRIEF AS AMICUS  
CURIAE IN SUPPORT OF PETITION FOR WRIT  
OF CERTIORARI

and

**BRIEF OF AMICUS CURIAE.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

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No. 242

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THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION, A FOREIGN CORPORATION,  
*Petitioner,*

*vs.*

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS AND MARCELLE  
KREISCHER,

*Respondents.*

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**MOTION OF ILLINOIS STATE CHAMBER OF COM-  
MERCE FOR LEAVE TO FILE A BRIEF AS AMICUS  
CURIAE IN SUPPORT OF PETITION FOR WRIT  
OF CERTIORARI.**

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*To the Honorable, The Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

Now comes the Illinois State Chamber of Commerce and respectfully moves this Court, pursuant to Rule 42, paragraphs 1 and 3, of the Rules of this Court, for leave to file the accompanying brief as *amicus curiae* in support of the petition for writ of certiorari heretofore filed in this case. The attorney for the petitioner herein has consented

to the filing of this brief and a copy of the written consent has been filed with the Clerk of the Court. The consent of the attorney for the respondents was requested but refused.

The Illinois State Chamber of Commerce, an Illinois not-for-profit corporation, is a civic association having among its membership many business firms and corporations operating businesses in Illinois and elsewhere which negotiate and are parties to collective bargaining agreements with various labor unions. Many of such members are multi-plant companies whose employees in different plants are represented by different labor unions.

The Glidden Company, petitioner in this case, is a member of the Illinois State Chamber of Commerce. It owns and operates two plants in Chicago, one of which is a plant of its Durkee Famous Foods Division which formerly operated the plant involved in this case at Elmhurst, Long Island, New York and now operates the plant involved in this case at Bethlehem, Pennsylvania.

The interest in this case of the Illinois State Chamber of Commerce arises from the facts that The Glidden Company is one of its members operating plants in this State and that the principles of law to be established by this case will be applicable to and govern the actions of not only The Glidden Company, but of other member firms and corporations of the Illinois State Chamber of Commerce in their collective bargaining relations with labor unions.

In the instant case, in the District Court and Court of Appeals, the parties treated this case primarily as a breach of contract case to be governed by applicable state law. Petitioner herein did not adequately discuss in its briefs below the question of the controlling application to this case of federal substantive labor law. The petition for writ of certiorari does not adequately discuss this question and

does not adequately set forth the reasons why this Court should issue a writ of certiorari in this case.

Movant believes that an awareness by this Court of the question of application to this case of federal substantive labor law is essential to this Court's proper consideration of the petition for writ of certiorari.

Respectfully submitted,

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July 26, 1961.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

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No. 242

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THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION, A FOREIGN CORPORATION,

*Petitioner,*

*vs.*

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS AND MARCELLE  
KREISCHER,

*Respondents.*

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## BRIEF OF ILLINOIS STATE CHAMBER OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Pursuant to the foregoing motion for leave to file, this brief is filed by the Illinois State Chamber of Commerce as *amicus curiae* in support of the petition for writ of certiorari heretofore filed in this case.

### INTEREST OF THE AMICUS CURIAE.

The Illinois State Chamber of Commerce, an Illinois not-for-profit corporation, is a state-wide civic association with a membership of almost 18,500 businessmen repre-

senting approximately 7,500 companies in 412 towns and cities throughout Illinois. Many of its members are companies operating plants both in Illinois and in states other than Illinois which negotiate and are parties to collective bargaining agreements with various labor unions. Many of its member companies operating geographically separated plants negotiate and are parties to collective bargaining agreements with different labor unions representing bargaining units of employees at the members' different plants.

The petitioner in this case, The Glidden Company, is a member of the Illinois State Chamber of Commerce and operates two plants in Chicago, one of which is a plant of its Durkee Famous Foods Division, the Division of petitioner involved in this case.

The Illinois State Chamber of Commerce believes that the principles of law finally established by this case will be of major importance to its members in their collective bargaining relationships with labor unions, and to the general economy and the business and labor climates of the State of Illinois. It therefore has an interest in this case in urging that this Court issue a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

## ARGUMENT.

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In this case the collective bargaining agreement between the employer and the labor union representing employees in the bargaining unit at the employer's Elmhurst, New York plant provided for termination of seniority after specified periods of continuous layoff. The Court of Appeals held, 288 F. 2d 99, that by virtue of these provisions Elmhurst plant employees whose employment had been terminated due to permanent closing of that plant for economic and business reasons had acquired "vested" seniority rights which survived termination of the labor agreement out of which they arose and entitled those employees to be employed at a new plant of the employer in Bethlehem, Pennsylvania "with the seniority and reemployment rights which they had acquired at the Elmhurst plant." 288 F. 2d at 103-04.

The preamble of the Elmhurst agreement recited that it was made and entered into by the employer "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York \* \* \*." 288 F. 2d at 103. (Emphasis added.)

### I.

#### **The Decision of the Court of Appeals Raises Important Questions Involving Federal Substantive Labor Law Which Should Be Decided By This Court.**

This Court, in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957), laid to rest the controversy whether section 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(a), authorizes federal courts to

fashion and apply federal substantive labor law in cases brought under that section for breach of collective bargaining agreements between an employer and a labor organization representing employees in an industry affecting commerce. The substantive law to be applied in such suits "is federal law, which the courts must fashion from the policy of our national labor laws." 353 U. S. at 456.

The opinion of the Court in *Lincoln Mills*, per Mr. Justice Douglas, quotes with approval that part of the legislative history of section 301 expressing the intent of the co-author of the Labor Management Relations Act, Representative Hartley, that section 301 contemplates "not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances \* \* \*, " including "'proceedings \* \* \* brought by \* \* \* interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.' " 335 U. S. at 455-56.

In section 301 suits between employers and unions for breach of contract, federal substantive law must be applied to determine the contractual rights and obligations of employer and union. The outcome of such suits necessarily will affect, and in many cases determine, the rights of employees covered by the contract, with the result that the body of federal substantive law now being fashioned by the federal courts in section 301 suits pursuant to *Lincoln Mills* will reach beyond the employer-union relations and control to varying degrees the employer-employee relations under the contract.<sup>1</sup> The recent decision of this Court

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1. In *United Protective Workers v. Ford Motor Co.*, 194 F. 2d 997 (7th Cir. 1952), a section 301 suit by a union was joined with an individual's diversity action for a declaratory judgment and damages where the actions were based on the same facts and labor agreement. In the normal section 301 action by an employer against a union for damages caused by breach of a no-strike clause,

in *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960), a suit under section 301 by a union against an employer to enforce an arbitrator's award, affected and determined in a most direct manner the rights under the collective bargaining agreement of the employees who had been discharged and subsequently ordered reinstated with back pay by the arbitrator.

The case at bar is a diversity of citizenship action by individual employees for breach of a collective bargaining agreement entered into between their employer and their labor union bargaining agent. 288 F. 2d 99, 100. Although individual employees may not sue under section 301 of the Labor Management Relations Act,<sup>2</sup> and although a union may not sue under section 301 to enforce uniquely individual rights of employees,<sup>3</sup> employees may sue for damages in the federal courts in diversity actions for breach of a labor contract, as in the present case,<sup>4</sup> and also may sue in the federal courts for declaratory judgments involving rights under collective bargaining agreements where the requirements for such a suit are present.<sup>5</sup> Thus,

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in which federal substantive law applies, the result may well determine also the contractual propriety of the employer's discharge "for cause" of the union agent for allegedly instigating the strike.

2. *United Protective Workers v. Ford Motor Co.*, 194 F. 2d 997, 1000 (7th Cir. 1952); *Schattle v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators*, 182 F. 2d 158 (9th Cir. 1950), cert. denied, 340 U. S. 827 (1950).

3. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U. S. 437 (1955).

4. See also *Local Lodge 2040, International Association of Machinists v. Servel, Inc.*, 268 F. 2d 692, 693 (7th Cir. 1959), cert. denied, 361 U. S. 884 (1959); *Transcontinental & Western Air, Inc. v. Koppal*, 345 U. S. 653, 656 (1953); *Smithey v. St. Louis Southwestern Ry. Co.*, 127 F. Supp. 210, 213 (E. D. Ark. 1953), aff'd., 237 F. 2d 637 (8th Cir. 1956).

5. Since individual employees may not sue under section 301, the reference in the legislative history of that section quoted by this Court in *Lincoln Mills*, p. 8 *supra*, to proceedings brought by individual employees under the Declaratory Judgments Act in

the question of what substantive law should be applied in suits by individuals to determine rights and obligations under collective bargaining agreements is of paramount importance, for it is federal substantive law which must be applied in section 301 suits by employers or unions to determine rights under the same agreements.

In this case the trial judge remarked that the parties apparently assumed that the substantive law to be applied was New York law, but that his examination of both New York law and federal law disclosed no differences which might bear upon the controversy. 185 F. Supp. at 442. To this extent the trial judge's opinion may fairly be viewed as holding that under federal substantive law seniority rights do not extend beyond the particular plant referred to in and covered by the collective agreement.

Nowhere does the majority opinion of the Court of Appeals disclose whether state or federal substantive law was relied upon as the source of the conclusion that seniority rights derived from a collective bargaining agreement survive termination of the agreement and are transferable to a new plant in another state so as to give employees terminated at the old plant employment rights at the new plant. Indeed, the majority opinion cites no authority whatever in support of this startling proposition. Instead of pertinent authorities, the majority opinion relies on what it chooses to call "the more rational, not to say humane, construction of the contract," and upon the proposition that it could "see no expense or embarrassment to the defendant" in adopting such a construction. 288 F. 2d at 184.

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order to secure declarations of contractual rights could have referred only to diversity actions. For suits by individuals seeking such declaratory judgments, see *United Protective Workers v. Ford Motor Co.*, 194 F. 2d 997 (7th Cir. 1952); *Local Lodge 2040, International Association of Machinists v. Servel, Inc.*, 268 F. 2d 692, 693-94 (7th Cir. 1959); *Edwards v. Capital Airlines*, 176 F. 2d 755 (D. C. Cir. 1949), cert. denied, 338 U. S. 885 (1949).

Chief Judge Lumbard, dissenting, would hold, correctly we believe, that in a case such as this "the contract should be construed in light of federal substantive law pursuant to § 301 of the Labor Management Relations Act, 29 U. S. C. A. § 185." 288 F. 2d at 105. He went on to point out that in his view, under applicable federal substantive law, plaintiffs were entitled to no relief.

The opinions below therefore pose for this Court the questions—the answers to which will have far-reaching importance in the labor field—(1) whether in diversity of citizenship actions by individual employees for damages for breach of a collective bargaining agreement or in appropriate actions by individuals for declaratory judgments, involving interpretation of collective bargaining agreement provisions which also may be the subject of section 301 litigation between employers and unions, federal or state substantive law is to be applied, and (2) if the former, what is that law.

Fraught as these questions may be with implications of encroachment upon the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), that in federal diversity cases the law to be applied is the law of the state, this Court's decision in *Lincoln Mills*, 353 U. S. 448, has raised the lid of Pandora's box in this vexing area of enforcement of collective bargaining agreements and requires a definitive pronouncement by this Court of the appropriate law to be applied in cases of this nature.

If uniformity of substantive law governing actions for violation of collective bargaining agreements and the federal fashioning of remedies consonant with the policies of our national labor laws were two of the basic objectives producing this Court's decision in *Lincoln Mills*, then the same objectives demand here that federal substantive law be applied in determining the rights of plaintiffs under

the collective agreement.<sup>6</sup> If this result does not obtain in suits of this nature, development of labor law involving enforcement of rights under collective bargaining agreements in interstate commerce will be plagued by the evils of forum shopping, conflicting interpretations of similar contract provisions depending on whether plaintiffs are individuals suing under state law in federal courts on the basis of diversity or unions suing under section 301, and needless arguments at the bargaining table occasioned by desires to contractually avoid or incorporate a myriad of inconsistent judicial interpretations of contract language.

The desirable goal of a uniform national labor policy, which includes consistent judicial interpretations of individual and collective rights under labor contracts affecting interstate commerce, will be nurtured here only by a decision that federal substantive law governs the rights and obligations of the litigants.

## II.

### **The Question of What Substantive Law Should Apply in Cases of This Nature Is of Sufficient Immediate Importance to Require Determination By This Court.**

Vast numbers of collective bargaining agreements in industries affecting commerce contain provisions for retention of seniority for some period of time following layoff.<sup>7</sup> These agreements provide a fertile field for litiga-

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6. See Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 59 Colum. L. Rev. 269, 272 n. 201 (1959); Wollett and Wellington, *Federalism and Breach of the Labor Agreement*, 7 Stan. L. Rev. 445, 469-70 (1955); Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1337-39 (1954); Note, 71 Harv. L. Rev. 1169, 1171 (1958); Comment, 21 La. L. Rev. 476, 481-82 (1961).

7. Sixty-three percent of 400 agreements analyzed by the Bureau of National Affairs provide for retention of seniority for some period of time following layoff. Bureau of National Affairs, *Basic Patterns in Union Contracts*, 1:1, 75:7 (1961).

tion raising questions similar to those in this case. There already is concrete evidence that the decision of the Court of Appeals in this case is spawning suits by employees and unions challenging the rights of companies engaged in interstate commerce to close down plants for economic and business reasons and move to new locations without transferring the work force *in toto* to the new location.<sup>8</sup>

These cases also will involve prickly questions of the substantive law to be applied in their determination. If this Court does not furnish the guideposts for such litigation, employers, unions, employees, and the lower federal courts will be forced to grope their way blindly through a complex area of labor-management relations. Labor and industrial tranquility, the touchstone of our national labor laws and policies, will hardly be fostered by such conditions.

### III.

#### **This Court Should Issue a Writ of Certiorari Because of the Conflict of the Decision of the Court of Appeals Below With Decisions of the Courts of Appeals for the Fifth, Sixth, and Seventh Circuits.**

Assuming *arguendo* the applicability of federal substantive law to this case, the decision of the Court of Appeals below that seniority rights survive termination of employment and termination of the collective agreement out of which they arose conflicts with the decisions of other courts of appeals in *System Federation No. 59 of Railway Employees v. Louisiana & Ark. Ry.*, 119 F. 2d 509 (5th Cir.

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8. See *Oddie v. Ross Gear and Tool Co.*, 2 Lab. Rel. Rep. (48 L. R. R. M.) 2586 (E. D. Mich. July 5, 1961), a diversity of citizenship action by individual employees for a declaratory judgment; *The Wall Street Journal*, July 13, 1961, p. 2, col. 3 (midwest ed.); *id.*, July 17, 1961, p. 5, col. 4 (midwest ed.); *id.*, July 21, 1961, p. 1, col. 6 (midwest ed.).

1941), cert. denied, 314 U. S. 656; *Elder v. New York Central R. R.*, 152 F. 2d 361 (6th Cir. 1945); and *Local Lodge 2040, International Association of Machinists v. Servel, Inc.*, 268 F. 2d 692 (7th Cir. 1959), cert. denied, 361 U. S. 884.

In *System Federation* seniority rights of employees arising out of a collective bargaining agreement were held not to survive termination of that agreement. "Collective bargaining agreements," said the Fifth Circuit, "do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions." 119 F. 2d at 515.

The Sixth Circuit held in the *Elder* case that seniority rights did not survive termination or modification of the collective bargaining agreement which had created them, relying on the holding of the Fifth Circuit in the *System Federation* case. 152 F. 2d at 364-65.

The most recent court of appeals decision on this point is that of the Seventh Circuit in the *Servel* case, wherein that Court held that seniority rights did not survive termination of employment resulting from a company's discontinuance of operations. 268 F. 2d at 698.

The holdings of the Fifth, Sixth and Seventh Circuit Courts of Appeals in the cited cases reflect the nearly universal view of the nature of seniority rights under collective bargaining agreements and should be adopted by this Court as the controlling federal substantive law.

**CONCLUSION.**

The petition for a writ of certiorari should be granted in this case for the reasons stated.

Respectfully submitted,

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of Commerce as Amicus Curiae.*

July 26, 1961.

MOTION FILED JUL 27 1961

OFFICE OF THE CLERK  
FILED

OCT 8 1961

IN THE

JOHN F. DAVIS, CLERK

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, A Foreign Corporation,  
*Petitioner,*  
*against*

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS and MARCELLE KREISCHER,  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE INSTITUTE OF SHORTENING AND  
EDIBLE OILS, INC. FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE

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IN THE  
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MOTION OF THE INSTITUTE OF SHORTENING AND  
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AS AMICUS CURIAE

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The Institute of Shortening and Edible Oils, Inc.  
(Institute) respectfully moves the Court pursuant to  
Rule 42 of its Revised Rules for leave to file a brief

as amicus curiae.\* Attorneys for the petitioner have consented to the filing of such a brief, but the attorneys for the respondents have refused to consent.

The Institute is a nonprofit membership corporation organized and existing under the laws of Louisiana. Its membership consists of companies which produce in excess of 90 percent of the food shortenings and edible oils manufactured in the United States. The petitioner in this proceeding is a member of the Institute.

Like petitioner, many of the other members of the Institute are engaged in multi-plant operations in different cities and states. Collective bargaining agreements in effect at various plants of the members of the Institute are similar to the collective bargaining agreement involved in this case—that is, they expressly relate to a single plant and contain no provision for the transferral of seniority rights to other plants of the company.

Because of this, the Institute is vitally interested in the issues involved in the instant case. If the decision of the lower court remains in effect, the members of the Institute who are parties to such collective bargaining agreements may be seriously hindered, if not blocked, from discontinuing uneconomical operations

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\* Pursuant to Rule 33 2(b), we note that this proceeding involves a question as to the constitutionality of the Act of July 28, 1953, 67 Stat. 226, Title 28 U.S.C. Section 171, an Act of Congress affecting the public interest. Neither the United States nor any agency, officer or employee thereof is a party to this proceeding. Title 28 U.S.C. Section 2403 may, therefore, be applicable. No court of the United States, as defined by Title 28 U.S.C. Section 451 has, pursuant to Title 28 U.S.C. Section 2403, certified to the Attorney General the fact that the constitutionality of such act of Congress has been drawn in question.

or from transferring such operations to more efficient plants. Moreover, the decision of the lower court confronts the members of the Institute, and presumably all other employers as well, with the question of whether and to what extent an employer may, under the Labor Management Relations Act of 1947, as amended, lawfully negotiate with a union representing employees in one of his plants with respect to terms and conditions of employment which will be applicable in another plant in which no union or a different union has been selected as the bargaining representative.

In view of footnote 1 on page 5 of the petition for certiorari, it appears that petitioner does not intend to direct the Court's attention to this important issue. In that footnote, petitioner merely suggests that an express agreement between it and the union conferring on its employees the seniority rights which were implied by the Court of Appeals "might well have constituted an unfair labor practice. Title 29 U.S.C., § 157, 158(a), (1), (5), . . . ." Although petitioner thus touches superficially the issue of possible conflict between the Court of Appeals' decision and the provisions of the Labor Management Relations Act of 1947, as amended, petitioner stops short of reaching the core of the issue.

Assuming *arguendo* that the Court of Appeals' interpretation of the collective bargaining agreement was not in error,\* the basic question is whether such

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\* As to this issue, the Institute believes that petitioner's position is entirely correct and will be adequately presented by petitioner. It is unthinkable that parties could reasonably have intended to incorporate in a collective bargaining agreement seniority rights of such far-reaching effect in the absence of express language so providing and in the face of provisions which plainly negative any such intention.

an agreement is *per se* in violation of Sections 7 and 9(a)\* of the Labor Management Relations Act of 1947, as amended, which authorize a union to bargain only with respect to the appropriate unit represented by it. If such an agreement is unlawful, it follows that it is unenforceable. The question of illegality arises because the Court of Appeals' decision, in effect, clothes a union with authority to negotiate with respect to a bargaining unit which it does not then and may never have statutory authority to represent. Specifically, the Court of Appeals has held that there was an implied agreement between petitioner and the union that petitioner's employees at the Elmhurst Plant were to have preferential seniority rights with respect to hire and tenure of employment at petitioner's newly established Bethlehem Plant.

By so construing the agreement, the Court of Appeals has, in effect, given its approval to bargaining by a union with respect to a collective bargaining unit (the new Bethlehem Plant) not represented by the union. Prior to the decision below, it was beyond question that a union could not negotiate with respect to the status of employees who were not within the

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\* "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

"Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees *in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." (Emphasis added.)

bargaining unit represented by it. Yet, the seniority provision which the court has read into the agreement is meaningful only in terms of a bargaining unit other than that represented by the union and is applicable only at a time when the employees affected are no longer employed in the bargaining unit represented by the union. Thus it seems plain that the union's authority to negotiate has, for all practical purposes, been extended beyond the statutory limits, and the decision below must, therefore, be reversed.

Wherefore, the Institute prays for leave to file a brief as amicus curiae addressed to the issue set forth above.

Dated July 27, 1961.

Respectfully submitted,

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MOTION FILED JUL 27 1961

OCT 9 1961

JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 242.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
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*Petitioner,*

vs.

OLGA ZDANOK, *et al.*,  
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

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MOTION FOR LEAVE TO FILE  
and

BRIEF AMICUS CURIAE  
OF THE CHAMBER OF COMMERCE  
OF THE CITY OF CLEVELAND, OHIO.

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# In the Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Chamber of Commerce of the City of Cleveland, Ohio hereby respectfully moves for leave to file a brief *amicus curiae* in this case. The consent of counsel for the petitioner has been obtained. The consent of counsel for the respondents was requested but refused.

The Cleveland Chamber of Commerce is a corporation organized and existing under the laws of the State of Ohio for the special purpose of protecting and advancing the commercial interests of the City of Cleveland, Ohio. The Chamber numbers over 4,725 members, many of whom are engaged in commerce and operating under collective bargaining agreements containing provisions similar, if not identical, to those under consideration in this case. As an organization existing for the protection and advancement of the commercial interests of the City of Cleveland, the Chamber is also vitally interested in the effect the decision of the Court of Appeals will have on

the plant mobility and general development of industries in the Cleveland area.

In the Court of Appeals, the petitioner maintained that, since only laid-off employees were entitled to retention of seniority under the terms of the collective bargaining agreement involved, the individual respondents, whose employment had been terminated, had no grounds for asserting denial of their seniority rights. Since it is likely that the petitioner will present this theory of the case again in this Court, the Cleveland Chamber of Commerce is requesting leave to file a brief *amicus curiae* in which it will be shown that the decision of the Court of Appeals warrants the attention of this Court because of its application to laid-off as well as terminated employees.\*

Respectfully submitted,

FRANK C. HEATH,

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Chamber of Commerce.

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Cleveland 14, Ohio,

Of counsel.

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\* The petition draws into question the constitutionality of the Act of July 28, 1953, 67 Stat. 226, 28 U. S. C. § 171, and neither the United States nor any agency, officer or employee thereof is a party to this proceeding. As such, it is noted that 28 U. S. C. § 2403 may be applicable. Your Amicus Curiae is not aware that any court of the United States has, pursuant to 28 U. S. C. § 2403, certified to the Attorney General the fact that the constitutionality of the foregoing statute has been drawn into question in the present proceeding. Although the constitutionality of this statute is not presented in the brief *amicus curiae*, service of the motion for leave to file and brief *amicus curiae* has been made on the Solicitor General of the United States pursuant to Rule 33(2) (b) of this Court.

# In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. \_\_\_\_\_

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION,

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OLGA ZDANOK, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
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## BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE CITY OF CLEVELAND, OHIO.

This brief is being filed by the Chamber of Commerce of the City of Cleveland, Ohio as Amicus Curiae pursuant to Rule 42(1) of this Court in support of the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

The petition seeks review of a decision of the Court of Appeals holding, with one judge dissenting, that the seniority provisions of a collective bargaining agreement, entered into between the petitioner-employer and the bargaining representative of the individual respondents, were "vested rights" which endured and were enforceable in an action for damages after good-faith termination of the agreement and after the discontinuance of operations by the petitioner at the plant to which the agreement was, by its own terms, limited in application.

## REASONS FOR GRANTING THE WRIT.

- 1. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH AND SEVENTH CIRCUITS AND MARKS A DRASTIC DEPARTURE FROM PRINCIPLES ESTABLISHED BY SEVERAL DECISIONS OF THIS COURT.**

In *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 457 (1957), this Court, recognizing that "it is not uncommon for federal courts to fashion federal law where federal rights are concerned," interpreted Section 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U. S. C. § 185, as authorizing the federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements.

Acting on the basis of this Court's mandate in *Textile Workers Union v. Lincoln Mills*, *supra*, the lower federal courts have held federal substantive law controlling in suits for the enforcement of collective bargaining agreements brought by individual employees as well as their certified bargaining representatives.<sup>1</sup> Moreover, as recently as the 1959 Term, this Court indicated that the presence of a union as a party was not essential to the applicability of federal substantive law in an action to enforce a bargaining agreement, when a third-party beneficiary action brought by the trustees of a welfare and retirement fund was held to be governed by principles of

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<sup>1</sup> "We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations." *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 456 (1957). See e.g., *Swift & Co. v. United Packing House Workers*, 177 F. Supp. 511, 513 (D. C. Colo. 1959); *New Bedford Defense Products Division v. Local 1113, Int'l Union, etc.*, 160 F. Supp. 103, 109 (D. C. Mass. 1958), aff'd, 258 F. 2d 522 (1st Cir. 1958); *Fay v. American Cystoscope Makers*, 98 F. Supp. 278, 281 (D. C. S. D. N. Y. 1951).

federal substantive law. *Lewis v. Benedict Coal Corp.*, 361 U. S. 459, 470 (1960).

The decision of the court below cannot be dismissed as a factual matter based solely on the particular terms of the agreement under consideration, for the court unequivocally, and with reference only to that clause of the agreement providing that employees retained seniority while laid-off from their employment, held that the individual respondents had acquired "vested rights" in their seniority which survived termination of the agreement and discontinuance of operations at the plant to which the agreement was limited in application.

This unprecedented decision of the Second Circuit stands in direct conflict with a decision of the Court of Appeals for the Seventh Circuit in *Local Lodge 2040, International Association of Machinists v. Servel*, 268 F. 2d 692 (7th Cir. 1959), cert. den., 361 U. S. 884 (1960). There a group of individual employees, working under a bargaining agreement providing that laid-off employees would retain their seniority for periods of time ranging from one to two years, instituted an action for a declaratory judgment to the effect that the bargaining agreement and certain rights acquired thereunder were in full force and effect, despite their employer's discontinuance of operations and termination of the agreement. The employees maintained that, since they retained their seniority for a period of two years after layoff, this status gave each of them the vested right to maintain their group insurance, hospitalization insurance and to retire under the company pension plan if they reached the required age during this two-year period.<sup>2</sup> Rejecting the employees' contention

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<sup>2</sup> The respondents' claims here are identical with those asserted in *Servel* in every respect. In urging that they have been

(Continued on following page)

that their seniority rights survived termination of the agreement, the Seventh Circuit remarked (268 F. 2d at 698):

"Contrary to appellants' contention, we find nothing in the agreement providing for a permanent layoff status to these employees or giving vested rights to seniority for two years following their lay-off. Seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence, and the right of seniority is not inconsistent with the right of an employer to discharge an employee." (Emphasis in original.)

In the court below, the respondents attempted to explain away the Seventh Circuit's decision in *Servel* on the ground that there the employer completely discontinued all operations; whereas the present petitioner had only closed its Elmhurst plant and transferred its operations to another state. This distinction, however, is no longer available to the respondents, for the Court of Appeals held that the respondents acquired "vested rights" in their seniority, and vested rights cannot be extinguished even by a complete cessation of operations. See e.g., *Vallejo v. American R. Co. of Porto Rico*, 188 F. 2d 513 (1st Cir. 1951). The conflict unwittingly created by the court below can only be attributed to an erroneous comparison of seniority rights with pension and retirement benefits, which by their very nature can take effect only upon ter-

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*(Continued from preceding page)*

deprived of rights under the petitioner's pension plan, group insurance program and their union's welfare plan, the respondents did not rely on any provision of the agreements establishing the plans. Rather, they asserted that they had been deprived of rights under each of the plans by reason of the petitioner's alleged breach of the seniority provisions of the collective bargaining agreement. (Pet. A-16.)

mination of the employer-employee relationship and which, incidentally, are vested only by virtue of express provision in the agreement conferring such rights.<sup>3</sup>

The decision of the court below is also in conflict with that of the Fifth Circuit in *System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co.*, 119 F. 2d 509 (5th Cir. 1941), where a labor organization, suing as the representative of its individual members, brought action against an employer for a claimed denial of seniority rights when the employer failed to re-employ several workers furloughed prior to termination of a bargaining agreement. The agreement involved provided that seniority would govern all reductions in the work force, and that employees would be rehired in order of their seniority. The union contended that, when the work force was increased after termination of the agreement, all workers furloughed during the term of the agreement were entitled to be re-employed in the order of the seniority conferred upon them by the agreement. The Court of Appeals affirmed the District Court's dismissal of the complaint, holding that "collective bargaining agreements do not create a permanent status, give an indefinite tenure or extend rights created and arising under the contract beyond its life."

Although this Court has never had occasion to consider the precise issue involved in this case, it has observed

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<sup>3</sup> The same misconceptions underlie respondents' comparison of seniority rights with accrued vacation and severance pay, as was pointed out by Judge Palmieri in the District Court: "In view of the purpose of such vacation and severance pay provisions, it would be unreasonable to suppose that the parties did not expect their rights and obligations to be determined by reference to their prior understanding and practice. By contrast, the plaintiffs here seek damages for violation of their alleged right to transfer and continue an employment relationship involving future performance obligations on both sides." (Pet. A-11.) See *In re Wil-Low Cafeterias, Inc.*, 111 F. 2d 429, 432 (2d Cir. 1940).

that an employee can acquire "no inherent right to seniority in service," *Trailmobile Co. v. Whirls*, 331 U. S. 40, 53 (1947), and that, if rights are to persist beyond the term of the collective bargaining agreement, the agreement must so provide or be susceptible of such construction. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, (1960). Moreover, in *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U. S. 521 (1949), this Court also indicated an awareness of the restraint courts must exercise in appraising the seniority provisions of collective bargaining agreements, when it remarked (337 U. S. at 526):

"There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining." (Emphasis added.)

It is difficult to conceive of any more dogmatic and unrestrained application of the seniority principle than the holding of the court below that seniority is a "vested right" which survives termination in good faith of the agreement conferring such rights. It is equally difficult to ascertain any broader unit to which these vested rights could apply than one impliedly extended from Elmhurst, New York to Bethlehem, Pennsylvania.

Illustrative of the confusion spawned by the decision in this case is *Oddie v. Ross Gear & Tool Co., Inc.*, (No. 21350, D. C. S. D. Mich.), 130 Daily Lab. Rep. E-1 (July 7, 1961), where several employees instituted an action against their former employer for a declaratory judgment to the effect that seniority rights acquired under a collec-

tive bargaining agreement survived termination of the agreement and discontinuance of operations by the employer at its plant in Detroit, Michigan. The employer had terminated the agreement in good faith and moved its operations to Tennessee. The agreement forming the basis of the action was expressly limited in application to the employer's plants "located within the city limits of Detroit" and made no provision for retention of seniority during layoffs other than a statement that laid-off employees would be recalled to work in order of seniority. On the defendant-employer's motion for summary judgment, it was shown that, during the bargaining negotiations leading up to the execution of the terminated agreement, the union had failed in its demand for a provision extending recognition, seniority rights and other benefits under the contract to any new plants created by the employer regardless of their location. Disregarding this relevant history of negotiations and relying solely on the decision of the Court of Appeals in the present case, the District Court held that the employees had acquired "vested rights" in their seniority which extended beyond termination of the agreement and which applied to any plant of the defendant-employer "regardless of physical location."

Your *Amicus Curiae* submits that the decision of the court below is so out of harmony with the principles established by this Court and heretofore followed by the lower courts in fashioning the substantive law applicable to actions of this nature as to require clarification and correction by this Court.

**2. THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL SUBSTANTIVE LAW INVOLVING THE ADMINISTRATION AND ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS WHICH, BECAUSE OF THEIR RECURRING NATURE, REQUIRE CONSIDERATION AND DECISION BY THIS COURT.**

In *Ford Motor Co. v. Huffman*, 345 U. S. 330, 333 (1953), this Court granted certiorari "because of the widespread use of contractual provisions comparable to those before us and because of the general importance of the issue in relation to collective bargaining." As noted before, the bargaining agreement forming the basis of the respondents' action in the present case provided that laid-off employees would retain their seniority for periods ranging from two to three years. The court below accepted this provision for retention of seniority as conclusive evidence of the parties' intention to confer permanent layoff status on all employees laid off during the term of the agreement.

The tremendous impact of the decision of the Court of Appeals on the administration and enforcement of existing collective bargaining agreements can be measured to some extent by reference to the widespread use of contract provisions comparable to those contained in the present agreement. Contracts providing for retention of seniority rights by laid-off employees for periods ranging from one to three years are quite common in unionized industries, Harbison, *Seniority Policies and Procedures as Developed through Collective Bargaining* 57 (1941), and a trend towards acceptance of provisions for retention of seniority for an *indefinite* period was observed in a survey by the United States Department of Labor as early as 1940. See *Seniority Provisions in Union Agreements*, U. S. Dept. of Labor Bull. R. 1308 (1941).

In a more recent survey of over 1,347 major collective bargaining agreements,<sup>1</sup> the Department of Labor found that a uniform period of seniority retention applicable to all employees, regardless of differences in length of service, was provided in more than two-thirds of the agreements surveyed. Retention periods ranging from one to two

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<sup>1</sup> Seniority Retention for Laid-Off Employees under Major Collective Bargaining Agreements, 1954-1955. U. S. Dept. of Labor Bull. No. 1209 (1957).

Period of Seniority Retention*	Agreements	Workers (Thousands)
Total with layoff provisions	<u>1,347</u>	<u>5,815.1</u>
No reference to retention of seniority after layoff	372	1,469.2
With provisions for retention of seniority after layoff	975	4,345.9
Period of retention:		
Less than 1 year	67	182.8
1 year	197	716.8
More than 1, but less than 2 years	102	294.2
2 years	161	1,145.3
More than 2 years	83	261.6
Equal to employee's length of service	33	365.8
Equal to employee's length of service up to a maximum number of years	73	356.1
Related in some other ratio to employee's length of service	157	435.5
For specified period; then continued for additional period, provided employee requests extension	21	110.1
Equal to length of service or specified period, whichever is greater	20	242.1
Continues indefinitely	18	76.7
Continues indefinitely, provided employee takes prescribed action	31	108.8
Other	12	50.1

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\* Note—Because of rounding, sums of individual items do not necessarily equal totals.

years were specified in 460 agreements covering nearly half of the workers under agreements with retention clauses. One-year periods were most prominent, but agreements providing for retention of seniority over a two-year period after layoff covered nearly twice as many workers. *Analysis of Layoff, Recall and Work-Sharing Procedures in Union Contracts*, U. S. Dept. of Labor Bull. No. 1209 (1957). These figures serve to demonstrate that the rights arising from retention of seniority create recurring problems, and that the impact of the decision of the court below will be felt with great force in every unionized industry in the United States. As such, the problem warrants consideration and decision by this Court. *Ford Motor Co. v. Huffman, supra.*

The significance and scope of the decision of the Court of Appeals in this case is not limited to the basic determination that employees can acquire "vested rights" in their seniority. Of equal importance to the sound development of federal substantive law in this area is the court's holding concerning the extent to which these rights must be recognized and given effect by an employer under the pain of liability for violation of his collective bargaining agreement.

The agreement under which the respondents claim their seniority rights was entered into between the petitioner and the respondents' bargaining representative "for and on behalf" of the petitioner's plant facilities located at Elmhurst, New York. (Pet. A-13.) The petitioner's closing of the Elmhurst plant was concededly done in good faith, and there was no evidence of any prior history as to transfer of seniority on an inter-plant basis. (Pet. A-13.) Choosing to ignore these vital considerations, the court below dismissed that provision of the agreement limiting

its application to the Elmhurst plant as "nothing more than a reference to the existing situation," which was not intended to restrict the operative geographical scope of the agreement. (Pet. A-27.)

One disturbing repercussion of this aspect of the Court of Appeals' decision has already appeared in *Oddie v. Ross Gear & Tool Co.*, *supra*, where, despite an affirmative showing by the employer that the agreement there involved was the result of negotiations in which the union failed to secure an enlargement of its operative geographical scope, the court held that the individual plaintiffs' seniority rights extended to any plant of the defendant-employer "regardless of physical location." The immediate response of the *Oddie* court to the decision of the court below marks only the beginning of a long line of decisions about to unfold and extend by implication the obligations of innumerable employers under existing collective bargaining agreements.

Prior to the decision of the Court of Appeals in this case, an employer was free to terminate a collective bargaining agreement upon discontinuance or relocation of the operations covered by the agreement, so long as such action was taken in good faith and not for the purpose of evading his obligations under the agreement. *Local Lodge 2040, Int'l Association of Machinists v. Servel*, *supra*; *System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co.*, *supra*. See also, *Bonnie Lass Knitting Mills, Inc.*, 126 N. L. R. B. 1396 (1960); *Brown-McLaren Mfg. Co.*, 34 N. L. R. B. 984 (1941); *Matter of Klotz*, 13 N. L. R. B. 746 (1939). The decision of the court below, disturbing as it does this generally accepted pattern of federal substantive law, can only serve to cripple all forms of industrial mobility and seriously confuse the administration

and enforcement of the collective bargaining agreements by which most industries are governed.

The decision of the court below also creates serious problems in the administration of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. § 141. Soon after the petitioner commenced operations at its Bethlehem plant, the Bethlehem employees selected a bargaining agent different from that representing the respondents at the Elmhurst facilities with authority to bargain with respect to wages, hours and working conditions, including seniority. (Pet. 5.) Any attempt on the petitioner's part to engraft the Elmhurst seniority agreement on the Bethlehem operations could well have constituted an unfair labor practice as a refusal to bargain with the designated representatives of the Bethlehem employees in violation of Sections 7, 8(a)(1) and 8(a)(5) of the Act, 29 U. S. C. §§ 157, 158(a)(1), (5).

This intrusion by the court below into an area reserved to the jurisdiction of the National Labor Relations Board and governed by the requirements of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. § 141, further illustrates the necessity for consideration of this case by this Court. In *Textile Workers Union v. Lincoln Mills*, *supra*, this Court directed the lower federal courts to fashion a body of federal substantive law on the pattern of our national labor policy. Any decision which collides with the principal expression of that policy certainly warrants the attention of this Court.

**CONCLUSION.**

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

**FRANK C. HEATH,**

*Attorney for the Cleveland  
Chamber of Commerce.*

**JONES, DAY, COCKLEY & REAVIS,**

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*Of Counsel.*

MOTION FILED JUL 28 1961  
Docket No. 242.

FILED

OCT 9 1961

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States  
OCTOBER TERM, 1961.

THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION, a foreign corporation,  
*Petitioner,*

*vs.*

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS, and  
MARCELLE KREISCHER,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF AMERICAN SPICE TRADE  
ASSOCIATION FOR LEAVE TO FILE  
BRIEF AS *AMICUS CURIAE*  
and  
BRIEF OF *AMICUS CURIAE*

CHARLES H. TUTTLE,  
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Trade Association.

Of Counsel:

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New York 5, New York.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1961.

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**Docket No. 242.**

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,  
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*vs.*

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT, QUIT-  
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

**MOTION OF AMERICAN SPICE TRADE  
ASSOCIATION FOR LEAVE TO FILE  
BRIEF AS *AMICUS CURIAE*.**

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES  
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT  
OF THE UNITED STATES:

The American Spice Trade Association respectfully moves this court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the petitioners herein to the filing of this brief has been obtained and filed with the Clerk of the Court. The consent

of the attorney for the respondent was requested but was refused.

The interest of the American Spice Trade Association and its reasons for asking for leave to file a brief *amicus curiae* are set forth below.

Movant is an industry trade association composed of persons, firms and corporations engaged in, or servicing, the spice and non-spice seasoning trade. The membership includes organizations which by volume engage in eighty to ninety per cent of the grinding, processing, and importation of spices and seasoning in the United States.

Movant believes that the issues herein involved are of far reaching concern to business organizations with outstanding and unexpired collective bargaining agreements covering one among a number of plants as well as to organizations having but a single plant and bargaining agreement. It is with the desire of presenting the interest and concern of such organizations and of indicating the potential consequence of the decision of the court below to those organizations that the American Spice Trade Association seeks permission for leave to file the accompanying brief.

The decision of the court below is directly opposed to the interests of this Association as a trade association representing industry members and business organizations having or making collective bargaining agreements in various locations throughout the United States. Collective bargaining agreements presently in effect throughout industry have terms and conditions which sufficiently resemble those under consideration here that the decision rendered in this matter is likely to control disposition of comparable or companion issues arising under many other union contracts.

The determination made in this case which is of concern to the movant is the decision of the court below that the

instant collective bargaining agreement granted seniority rights to employees which they were entitled to exercise at a plant of their employer other than the one in which they were actually employed and to which the agreement was expressly made applicable. We submit that such a determination was erroneous for reasons set forth in the accompanying brief. The parties to this controversy, and their counsel, are particularly concerned with the application of the rules of transferable seniority rights in this specific case in which one plant was entirely abandoned and, simultaneously, a new unstaffed plant was placed in operation. However, the impact of the decision of the court below extends to other contingencies than such a case and it is with a desire to indicate the potential and unwarranted effect in such other instances that this motion is made.

Movant believes that the decision of the court below which imposes upon an employer an obligation to grant preferential employment rights at one plant to employees laid off at another would be disruptive of normal employee relations and would inevitably cause conflicts with collective bargaining agreements which might be in effect at the former plant.

Movant further believes that the decision of the court below threatens an employer's right to manage the affairs of the company by restricting the company from relocating its facilities, in case of competitive or economic necessity, except under restriction which would, in many cases, be tantamount to a prohibition upon moving. If such limitations upon the power of an employer were specifically or expressly assumed by the employer in the collective bargaining agreement the danger indicated might not be present but in this case the limitation was not specifically set forth in the collective bargaining agreement.

Movant believes it to be of the greatest importance to settle and clarify the rights and duties as to seniority of the union, the employer and the employee involved in or committed to all collective bargaining agreements which are specifically confined by their terms to a single plant and location.

Dated: July 26, 1961.

CHARLES H. TUTTLE,  
Attorney for American Spice  
Trade Association,  
15 Broad Street,  
New York 5, New York.

Of Counsel:

THOMAS W. KELLY.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961.

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,  
a foreign corporation,

Petitioner,

vs.

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT, QUIT-  
MAN WILLIAMS, and MARCELLE KREISCHER,  
Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## BRIEF OF AMERICAN SPICE TRADE ASSOCIATION AS *AMICUS CURIAE.*

### Statement.

Movant is of the opinion that upon expiration of the terms of this collective bargaining agreement, as well as upon the final termination by discharge of the employment of these respondents, there came to an end, all contractual obligations except those as to which a breach had already occurred and all contractual rights the vesting or accruing of which required any subsequent act. The arguments substantiating that view are sufficiently presented by petitioner's counsel to require no supplemental submission by the movant.

Accordingly, movant desires to stress its additional contention that, quite apart and aside from that argument,

the *plant* collective bargaining agreement in issue here, or others comparable or similar to it, of which there are many, ought not be construed to impose obligations which extend throughout the *company* or attach to any plant other than the one at which the agreement is in operation unless *specific* provision to that effect is embodied in the agreement.

### **ARGUMENT IN SUPPORT OF REASONS**

#### **I.**

**The instant collective bargaining agreement was, in all of its phases, including seniority rights, confined and restricted in its scope and application to the single plant at Elmhurst, New York.**

It is respectfully submitted that the scope and obligation of the instant collective bargaining agreement in its totality is confined and limited by its terms and its nature to that part, division, or component of the affairs and activities of the employer as it conducted in the State of New York. This collective bargaining agreement could not in all of its terms, or any of them, be transplanted to and be imposed upon a plant in Pennsylvania. We turn to some of the specific provisions of the collective bargaining agreement which conclusively establish the validity of this conclusion: (a) the grievance procedure for the settlement of disputes was to be referred to the New York State Mediation Board (Art. XX 2(e), Ex. A to Answer; R. 73a); (b) the Disability Benefit Plan was a New York State approved and assessed program (id., Art. XIV, 5-6; R. 71a); (c) the terms for checkoff of union dues and the welfare plan were for the benefit only of the one New York local union (id., Art. III and XIV; R. 58a and 70a); (d) the

seniority list itself includes only employees at the one plant (*id.*, Art. XI, 2; R. 67a).

Movant does not suggest that if the New York plant had merely been transposed substantially intact within an adjacent vicinity, or a block away, that the contract would have thereupon or thereby become inoperative. That however is not the circumstance existing in this case. The change effected here was such as to render nugatory basic and essential clauses and activities of the collective bargaining agreement. The original plant was not moved but was lawfully abandoned. The new plant, considered in the context of union and labor relations, was in no sense a reproduction or continuity of the old but was located in another state, was outside the jurisdiction of the original union, and was removed in every practical consideration from mass continuity of employment by the prior employees.

No party to this proceeding could reasonably say, and indeed none do, that this collective bargaining agreement, as such, could be operative at the new plant, even if its terms had not expired. (Appendix A to Petition for Writ, p. A-13 footnote 26).

What is said in effect is that such parts of the union contract as grant the employee benefits and seniority privileges ought be imposed on the Pennsylvania plant though the entire balance of the agreement admittedly has no such status or terms as would allow it to be effective at this new location. In other words the failure to honor or perform the collective bargaining agreement terms as to seniority at the Pennsylvania plant constituted a breach of that agreement.

We respectfully submit that where the total collective bargaining agreement, considered as a whole, is so wholly inapplicable to and so clearly impossible of execution at the

new plant it does great violence to the orderly declaration of labor relations to isolate from its context one phase of that same agreement and find that it has a scope and application which is the exact converse of that given to the agreement from which it derived. It follows, we submit, that seniority rights could not be claimed by the employees at the plant in Bethlehem, Pennsylvania or, to put it another way, the refusal to grant seniority rights at the Pennsylvania plant was not a breach of the collective bargaining agreement.

### III.

**Seniority rights created and fixed at one plant ought not be transferred to or imposed upon another plant in the absence of specific and express provision expressing the conditions under which the transposition is to be effected since otherwise an orderly and exact determination of important rights is not possible.**

The collective bargaining agreement here involved contains express provision with respect to the rights and obligations of employer and employee in those instances in which there occurs either a "curtailment of production" or a "continuous layoff". The language of the agreement as it pertains to each such instance is as follows:

1. *In the case of a continuous layoff:* "Employees whose seniority is terminated due to continuous layoff shall receive first preference for employment before new employees are hired." (Art. XI 6(c), Ex. A to Answer; R. 69a)

2. *In the case of a curtailment of production:* "Employees shall be recalled to work in the reverse order of their layoff" (Art. XI 4(e) id.; R. 68a)

In the particular circumstances here involved the event said to bring the quoted rights into operation was the permanent shutdown of the plant at which the agreement was in operation.<sup>1</sup> However the circumstances or contingencies under which a right to preferential reemployment arises under such clauses is not confined to such a case. There may be numerous instances of temporary layoff due to work load variations. Would these employees, even assuming the union contract had not expired, have the right in such cases to seek work at another plant, new or old, then operated by the employer where new applicants are being hired to perform the same functions? *If this old plant had been abandoned and its activities been relocated after the new plant was in operation* would it be said that these employee petitioners could in that case "follow their work" to the Pennsylvania plant and interpose their seniority ratings on the complex of seniority ratings that might then exist there? If an employer with three separate plants had contract clauses similar to those involved here, and employees in two such plants were laid off and claimed employment priority over new applicants at the third plant one can readily visualize the impossibility of marshalling seniority rights among the resulting mixture of seniority contracts which derived from separate plants, at different locations, under different contracts, and with disparate and perhaps conflicting unions. Indeed we submit that the prospect of contemplating such negotiable seniority rights is possible only in such a case as this where it happens that the situation is a simple one in which the old plant is entirely abandoned and a new one, not yet staffed with employees or subject to seniority ratings, is simultaneously opened by

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<sup>1</sup> We leave aside our belief that such a situation is not a "lay off" within the meaning of the agreement but is a permanent discharge.

the employer. If in this case the "new plant" had been one of a long standing operation with seasoned collective bargaining agreements in place it is difficult to suppose that the court below would have imposed the instant seniority rights upon those already in existence even if the production in question, had been relocated to the new plant.

We respectfully submit that a one plant collective bargaining agreement cannot be made operative in any of its terms to another separate and autonomous plant of the employer unless specific and express written terms are embodied in the union contract which are directed toward setting forth the extent and the manner in which such a transposition of rights shall be effected. A failure to recognize the essential importance of such a requirement can lead to the most complex, involved, and unforeseen consequences. It is not difficult to visualize the problems inherent in making any seniority rights which are operative at one plant effective at another but to accomplish or compel that transposition without specific contract terms indicating at least in a general way the rules and standards which will govern such transposition would, we believe, result in the utmost confusion and uncertainty as to the particular rights and duties of the employer, the employee, and the union involved.

The consequences of the ruling of the court below are of material and substantial concern and importance to an orderly development of basic rules concerned with the meaning and effect "of contracts between an employer and a labor organization" (29 USCA Sec. 185; 61 Stat. 156).

**Conclusion.**

For the foregoing reasons the petition for writ of certiorari should be granted, the decision of the Circuit Court reversed and the judgment of the District Court reinstated.

Dated: July 26, 1961.

Respectfully submitted,

**CHARLES H. TUTTLE,  
Attorney for American Spice Trade  
Association,**

15 Broad Street,  
New York 5, New York.

**THOMAS W. KELLY,  
Of Counsel.**

FILED JUL 28 1961

Office-Supreme Court, U.S.  
FILED

OCT 9 1961

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, a Foreign Corporation, *Petitioner*,

against

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS and MARCELLE KRIEISCHER,  
*Respondents*

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

MOTION OF CHAMBER OF COMMERCE OF THE UNITED  
STATES FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE AND BRIEF OF AMICUS CURIAE

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IN THE  
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OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
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On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

—  
**MOTION OF CHAMBER OF COMMERCE OF THE  
UNITED STATES FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE**

The Chamber of the United States respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*.

The consent of the attorney for the petitioner herein has been obtained, but the attorney for respondents herein refused to consent to the filing of a brief by the Chamber of Commerce of the United States as *amicus curiae*.

The Chamber of Commerce of the United States is a non-profit corporation organized and existing by

virtue of the laws of the District of Columbia and consisting of membership of more than 3,000 national, state, and local chambers of commerce and trade associations, with an underlying membership of more than 21,550 business firms.

The applicant has an interest in this case in that many of its members are engaged in businesses whose activities affect interstate commerce and are, therefore, subject to federal laws that affect the employer-employee relationship in these businesses. This brief is filed because the issue involved here is of widespread significance and of utmost importance to members of the Chamber of Commerce of the United States.

**Statement Under Rule 33.2(b)**

Since the proceeding draws into question the constitutionality of the Act of July 28, 1953, 67 Stat. 226, Title 28 U.S.C. Section 171, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that Title 28 U.S.C. Section 2403 may be applicable.

To the best knowledge of the undersigned, no Court of the United States as defined by Title 28 U.S.C. Section 451 has, pursuant to Title 28 U.S.C. Section 2403, certified to the Attorney General the fact that the constitutionality of such Act of the Congress has been drawn in question.

WILLIAM B. BARTON,  
*General Counsel*  
Chamber of Commerce  
of the United States  
1615 H. Street, N. W.  
Washington, D. C.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
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OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
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On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

—  
**BRIEF OF CHAMBER OF COMMERCE OF THE  
UNITED STATES AS AMICUS CURIAE**

—  
**I. INTRODUCTION**

This brief *amicus curiae* is submitted by the Chamber of Commerce of the United States of America as provided in Rule 42(3) of the Rules of the Supreme Court.

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**II. INTEREST OF THE CHAMBER OF COMMERCE OF THE  
UNITED STATES**

The Chamber of Commerce of the United States is a federation, consisting of membership of more than 3,000 national, state and local chambers of commerce and trade associations, with an underlying membership of approximately 1,700,000 business firms and a

direct membership of more than 21,550 business firms. Many members are engaged in businesses in interstate commerce or in businesses whose activities affect interstate commerce and are, therefore, subject to federal laws that affect the employer-employee relationship in these businesses. This brief is filed because the issue involved here is of widespread significance and of utmost importance to members of the Chamber of Commerce of the United States.

### III. ARGUMENT

Amicus curiae is concerned that the central issue before this Court on the petition for writ of certiorari involves the conflict created by the decision of the United States Court for the Second Circuit in Case No. 217,<sup>1</sup> and decisions of the United States Courts of Appeals for the Fifth,<sup>2</sup> Sixth,<sup>3</sup> and Seventh<sup>4</sup> Circuits. In view of the widespread confusion and general uncertainty created by this conflict, amicus curiae respectfully urges this Court to examine this ruling and hand down a clear judgment on the issues involved.

The substantive issues raised in the petition relating to seniority rights arising under collective agreements are of widespread importance because of their impact on labor-management relations and the entire collective bargaining process. Contractual provisions setting

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<sup>1</sup> Glidden v. Zdanok et al., 288 F. 2d 99.

<sup>2</sup> System Federation No. 59 of Railway Employees v. La. & A. Ry. Co., 119 F. 2d 509, 515 (CA 5th Cir. 1941).

<sup>3</sup> Elder v. N. Y. Central R. R. Co., 152 F. 2d 361, 364 (CA 6th Cir. 1945).

<sup>4</sup> Local Lodge 2040, International Association of Machinists v. Servel, 268 F. 2d 692, 698 (CA 7th Cir. 1959).

forth employee seniority rights and management obligations vary widely depending on the intent of the parties as specified in the collectively bargained agreement. Some contracts provide for company-wide seniority, others for plant, departmental or job seniority. Combinations and variations of these general classes of seniority rights are numerous, depending on the specific rights bargained for by the employer and the collective bargaining agent of its employees.

In the case before this Court, the collectively bargained agreement was silent on the question of seniority rights arising under an agreement applicable to a specific plant after the plant has been transferred to another location.

Contractual provisions defining seniority rights with language comparable to the contract here in controversy are widely used by management throughout the country. Management's right to manage, which includes certain freedom of action incident to relocation of its plants, is directly affected by the specific terms and conditions agreed to during the collective bargaining process and set forth in the contract.

For the foregoing reasons, amicus curiae submits that the issues raised in the petition for a writ of certiorari are of vital concern to American business, and on behalf of its many members urges this Court to grant the petition.

WILLIAM B. BARTON

GEORGE J. PANTOS

1615 H Street, N. W.

Washington, D. C.

*Attorneys for the Chamber  
of Commerce of the  
United States of America*

**PROOF OF SERVICE**

I, William B. Barton, one the attorneys for the movants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 28th day of July, 1961, I served copies of the foregoing BRIEF AMICUS CURIAE on the several parties to the principal case as follows:

1. On the petitioner, The Glidden Company, Durkee Famous Foods Division, by mailing a copy in a duly addressed envelope with first-class postage prepaid to their attorney of record: Chester Bordeau, White and Case, 14 Wall Street, New York 5, New York.
2. On the respondents, Olga Zdanok et al., by mailing a copy in a duly addressed envelope with first-class postage prepaid to their attorney of record: Morris Shapiro, Sahn, Shapiro and Epstein, 350 Fifth Avenue, New York 1, New York.
3. On the Solicitor General by mailing a copy in a duly addressed envelope with first-class postage prepaid to the Office of the Solicitor General: Archibald Cox, Solicitor General, Department of Justice, Washington 25, D. C.

2.2  
WILLIAM B. BARTON

IN THE

JOHN F. DAVIS, CLERK

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 242.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, a Foreign Corporation,  
*Petitioner.*

VS.

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS and MARCELLE  
KREISCHER, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

**MOTION OF THE GEORGIA STATE CHAMBER OF  
COMMERCE FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE**

and

**BRIEF OF GEORGIA STATE CHAMBER OF  
COMMERCE AS AMICUS CURIAE.**

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## MOTION OF THE GEORGIA STATE CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Georgia State Chamber of Commerce moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the Petitioner herein has been obtained and filed with the Clerk, but the attorney for the Respondents herein refused to

consent to the filing of a brief by the Georgia State Chamber of Commerce as *amicus curiae*.

The Applicant has an interest in this case in that it represents hundreds of business and industrial establishments, many of which have collective bargaining agreements with labor organizations containing provisions similar to those which are the subject matter of this case. The construction of these provisions by the Court of Appeals is adverse to the interests of the business and industrial establishments represented by Applicant. Furthermore, the decision of the Court of Appeals has created uncertainties and confusion as to the legal effect of certain provisions in all collective bargaining agreements.

Applicant has a further interest in this case in that it is actively engaged in a broad industrial development program designed to encourage and promote the location of new manufacturing plants and industrial establishments within the State of Georgia. The decision of the Court of Appeals has a very damaging effect upon said industrial development program.

It is the belief of the Applicant that the far-reaching effects of the decision in this case both upon the interests of Applicant's members and its industrial development program, as well as upon the economy in general, will not adequately be presented by the Parties. Such facts should be taken into consideration by this Court inasmuch as this case is an important step in the development of a body of Federal substantive law in the labor relations field.

Since the proceeding draws into question the constitutionality of the Act of July 28, 1953, 67 Stat. 226, Title 28 U.S.C., Section 171, an Act of Congress affecting the public interest, and neither the United States nor any agency,

officer or employee thereof is a party, it is noted that Title 28, U.S.C., Section 2403, may be applicable.

No Court of the United States as defined by Title 28, U.S.C., Section 451, has, pursuant to Title 28, U.S.C., Section 2403, certified to the Attorney General the fact that the constitutionality of such Act of the Congress has been drawn in question. In accordance with the rules of this Court the Solicitor General of the United States is being served with a copy of this Motion and accompanying Brief.

Respectfully submitted,

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**BRIEF OF GEORGIA STATE CHAMBER OF  
COMMERCE AS AMICUS CURIAE.**

**STATEMENT.**

This Brief is filed on behalf of the Georgia State Chamber of Commerce, an association of business and industrial establishments located in the State of Georgia.

## **QUESTIONS PRESENTED.**

The Georgia State Chamber of Commerce hereby adopts by reference the questions presented by the Petitioner in its Petition for Writ of *Certiorari*.

## **ARGUMENT.**

### **I. The decision of the Court of Appeals is contrary to the public interest.**

The Court of Appeals ruled, with the Chief Judge dissenting, that seniority provisions in a collective bargaining contract transcend the term of the contract and remain valid and binding after the termination of both the contract and the employment relationship.

The economy of the United States depends upon industrial expansion and modernization. With the population growth rate and the increasing pressure from foreign competition our very survival is directly related to our ability to keep pace through research, development and modernized industrial facilities. The public interest demands an ever improving, an ever expanding economy.

The unlimited potential liabilities imposed upon industry by the decision in this case are so great as to be a detriment to expansion. If seniority rights transcend the term of the contract and carry beyond both the employment relationship and the particular plant installation then they have no limits whatsoever. A realization of the potential liabilities in any expansion or modernization program because of the unlimited seniority rights is enough, in itself, to dissuade even the most progressive minded businessman.

There are many areas in the United States which have yet to develop their industrial potential. There are wide variances in the economies of our states. The less industrialized states are by and large at the lower strata of our economy. Similarly, some of the industrial states are suffering economically because of a need to diversify their industry. Many organizations throughout the country are working feverishly to promote the industrialization of their areas. The Georgia State Chamber of Commerce has worked toward this end for years. It has just recently launched a broad-scale program designed to encourage industry to locate plants and facilities within the State of Georgia. The results of such a program will inure not only to the benefit of the people of Georgia but to the country as well. The decision of the Court of Appeals in this case erects an insurmountable roadblock in the path of all industrial development programs.

## **II. The decision of the Court of Appeals is contrary to the interest of the working man.**

The decision of the Court of Appeals appears to be motivated by a desire to reach a humane result insofar as the Respondents are concerned. The ultimate result of the principles laid down in this decision can only be detrimental to the very people it seeks to help. If industry is prevented from modernizing and expanding by impossible obstacles and unpredictable liabilities such as this decision creates then the new jobs necessary to accommodate the growing work force will not materialize. In the long term the working man who depends upon those jobs will suffer along with industry and ultimately the country as a whole. Unemployment already is one of our major national problems. Any further hindrance to industrial expansion and modernization will enlarge and complicate the unemployment problem to even greater proportions.

### **III. The decision of the Court of Appeals is in conflict with the Federal labor policy.**

This decision is a major step in the development of a body of Federal substantive law in the labor-management field. It obviously is a departure from the basic principles governing contracts generally. If there are to be such departures then certainly there should be strong justification. Factors such as those heretofore discussed should be considered. Likewise the over-all policy found in the Federal labor legislation should be taken into consideration. That policy basically is designed to promote industrial peace.

The decision of the Court of Appeals in this case is contrary to the Federal labor policy in that it promotes discord where none now exists. Where the issue of seniority might have been one of major dispute in the early days of labor movement it has become routine in recent years. Labor and management now generally recognize the principle of seniority and the negotiation usually concerns itself with the type system to be utilized. But the decision of the Court of Appeals throws such a drastically new light upon seniority rights, not to mention the vast uncertainties and potential liabilities, that the issue must now be whether management can afford to agree to seniority at all. Needless to say, this opens up an area of labor-management combat which at the present time is relatively peaceful.

Most collective bargaining agreements make provision for seniority rights. It generally has been considered that these rights were confined to the plant facility (unless otherwise provided), the term of the contract or the term of the employment relationship. All of the cases dealing with seniority rights cited by the Petitioner, and incorporated here by reference, are based upon this basic

premise. The decision of the Court of Appeals in this case opens up areas of controversy over the far-reaching effects of seniority rights heretofore unimaginable. There are no limits as to time or place. What would happen in the case of a multi-plant employer who simply discontinues the use of a plant, without replacement, or who consolidates two plants, or who moves a portion of an operation to another plant? Suppose the employees decided to revoke the authority of the bargaining agent, which they have a right to do. Suppose a company replaced two or three plants with one new plant. The potential liabilities and complications under the governing principles of this decision surpass even the wildest imagination. There is no way it can be reconciled with reason, justice or logic. The effect of this decision if allowed to stand will be to plunge the entire labor-management field into utter confusion, chaos, strife and frustration.

### **CONCLUSION.**

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Dated July , 1961.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1961

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AGAINST

OLGA ZDANOK, JOHN ZACHARCYK, MARY A.  
HACKETT, QUITMAN WILLIAMS and MARCELLE  
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR CERTIORARI

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*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

**BRIEF FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR CERTIORARI**

---

**Questions Presented**

1. Where respondents were laid off during the term of a collective bargaining agreement which provided for three-year retention of seniority upon continuous layoff and for indefinite preference in employment over new employees, did petitioner's refusal to re-employ respondents with seniority at the new plant to which its operations had been shifted, constitute a breach of the agreement for which petitioner is answerable in damages?

2. Did the participation in this case of Judge Madden of the Court of Claims, sitting in the Court of Appeals by designation of the Chief Justice of the United States, invalidate the judgment of the Court of Appeals?

## **Constitutional Provisions and Statutes Involved**

Respondents do not believe that some of the constitutional provisions referred to at page 3 of the petition are involved in this case, for the following reasons:

Article I of the Constitution of the United States is not involved because no legislative powers vested in Congress under Article I are in question in this case.

49 Stat. 452; 61 Stat. 140; 65 Stat. 601; 73 Stat. 525, 542, 545; Title 29 U. S. C. § 158 (a), (1), (5); (b), (1), (3), are not involved because no unfair labor practices governed by those statutes are involved in this case.

61 Stat. 40; Title 29 U. S. C. § 157 is not involved because the right of employees to organize and bargain collectively is not in issue in this case.

61 Stat. 156; Title 29 U. S. C. § 185 (a) is not involved because jurisdiction of the District Court was invoked in this case on the ground of diversity of citizenship, and not under the provisions of the statute cited.

## **Statement of the Case**

### **A. Nature of the Action.**

Respondents brought this action against petitioner in the New York Supreme Court to recover damages for breach of a collective bargaining agreement made by petitioner and respondents' union, the benefits of which enure to respondents. On petitioner's application the cause was removed, by reason of diversity of citizenship, to the United States District Court for the Southern District of New York.

The gist of the action was that petitioner breached the contract and thereby deprived respondents of employ-

ment and of substantial property rights accruing to them thereunder, including rights under a pension plan, a welfare plan, and a group insurance plan.

### B. Pertinent Provisions of the Contract.

In 1929 petitioner began to operate a plant at Elmhurst, New York, known as its Durkee Famous Foods Division. Respondents were continuously employed by petitioner at this plant for periods of from 10 years to 25 years.

Effective December 1, 1949, petitioner and respondents' union entered into a series of collective bargaining agreements, the last of which embraced the two-year period from December 1, 1955 to November 30, 1957. Each of these agreements provided for a system of seniority for employees under which, in case of curtailment of production, employees were to be laid off in the reverse order of seniority. Seniority could be terminated only for the following reasons: (1) quitting voluntarily; (2) discharge for cause; (3) failure to acknowledge within 2 days a notice to report for work; (4) failure to return to work within 3 days after being notified to report to work. Seniority could also be terminated by reason of *continuous layoff*. As to this the agreement provided:

"(b) In instances of continuous layoff, seniority shall be terminated after:

(1) An employee with less than five (5) years' continuous employment at the time his layoff began is on a continuous layoff of two (2) years; or

(2) An employee with more than five (5) years' continuous employment at the time his layoff began is on a continuous layoff of three (3) years.

(c) Employees whose seniority is terminated due to continuous layoff shall receive first preference for employment before new employees are hired."

Each respondent having been employed by petitioner for more than five years, his seniority would not terminate until three years elapsed from the date of his layoff.

**C. Transfer of Operations from Elmhurst, New York to Bethlehem, Pennsylvania.**

On September 16, 1957, petitioner notified the union that it would terminate the agreement on its expiration date of November 30, 1957. Thereafter, petitioner progressively discontinued production at the Elmhurst plant and began to remove its machinery and equipment from Elmhurst to a new plant it was setting up in Bethlehem, Pennsylvania, which it had leased in May, 1957. During October, November and December of 1957, petitioner transferred from Elmhurst about 75% of the machinery used in Bethlehem in coconut operations, and approximately 25% of the machinery used in Bethlehem in condiment and spice operations. It also installed additional equipment there and effected some procedural changes to increase production. Operations at Bethlehem were begun in November and December, 1957.

Although petitioner closed the Elmhurst plant on November 30, 1957, respondents' employment was terminated while the agreement was still in effect and the plant still in operation. All respondents were laid off on November 1, 1957, except respondent John Zacharczyk, who was laid off on November 18, 1957. None of respondents has been employed by petitioner since that time, nor has any of them received any benefit, compensation or other consideration by reason of employment by petitioner.

Petitioner did inform respondents that they could apply for work only as new employees at the Bethlehem plant, along with all other applicants for employment there. Petitioner refused to employ respondents at the Bethlehem plant with credit for seniority earned and accrued during the periods of their employment by petitioner at Elmhurst.<sup>1</sup>

At Bethlehem, petitioner hired new employees who perform duties of the same nature as respondents had performed at Elmhurst. Petitioner manufactures at Bethlehem the same products it manufactured at Elmhurst at the time it closed that plant.

#### D. Proceedings Below.

The District Court (Palmieri, D. J.) concluded that respondents

"have failed to prove facts which would entitle them to the relief sought"

and directed judgment on the merits against them. The court stated that the critical issue was not whether respondents' seniority rights survived the termination of the contract period, "but whether the unit to which their rights could attach extended beyond the Elmhurst plant." Upon review of the facts and a construction of the agreement, the court concluded that

"the parties' bargain and understanding was limited to seniority rights at the Elmhurst plant."

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<sup>1</sup> Not only were respondents deprived of employment by reason of petitioners' refusal to acknowledge their seniority rights, but they lost other benefits as well. A *pension plan* covering them provided for normal retirement at 65; retirement for disability at 55; early retirement at 55, on 15 years' employment; and vested right at 45, on 15 years' employment. A *welfare plan* afforded medical, surgical and hospital insurance. A *group insurance plan* provided for life insurance and accidental death insurance.

On appeal by respondents to the Court of Appeals for the Second Circuit, the judgment was reversed. The opinion of the court was written by Judge Madden of the Court of Claims (sitting by designation) and concurred in by Judge Waterman. Chief Judge Lumbard dissented in a separate opinion.

The court construed the contract; it found, first, that respondents' seniority rights survived the termination of the contract period, saying:

"If one has in October a right to demand performance of the corresponding obligation at any relevant time within a period of three years, it would be strange if the other contracting party could unilaterally terminate the right at the end of three weeks."

The court found, further, that respondents were entitled to be employed by petitioner at its Bethlehem plant in the circumstances here involved, saying:

"A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it."

Chief Judge Lumbard's dissent was based upon a different construction of the contract. He said:

"The issue here is whether *this* collective bargaining agreement gave the employees the right to follow the work to the new site. I would hold that it did not." (Emphasis supplied.)

The basis for this conclusion is the same as that of the District Court, namely, the absence of an express provision in the contract requiring inter-plant transfer of seniority rights.

## ***ARGUMENT***

### I

**This action by individual employees to recover damages for breach of contract by an employer, federal jurisdiction being based solely on diversity of citizenship, involves interpretation of the seniority provisions of a particular collective bargaining agreement and does not present an important question of federal law which should be settled by this Court.**

#### **A. No important question of federal law is involved.**

Seniority is a highly prized personal right based upon contract, which accrues to an employee from his length of service. It "is more than merely the right to work; it is the best kind of unemployment insurance. It assures the man that the longer he works the more certain it is that he will retain his job at a wage greater than the small amount available for unemployment compensation". Pipin, *Enforcement of Rights Under Collective Bargaining Agreements*, 6 U. of Chi. L. R. 657 (1939); see also *Dooley v. Lehigh Valley R. R. Co.*, 130 N. J. Eq. 75 (1941).

Seniority provisions in collective bargaining agreements enure directly to the benefit of individual employees and may be enforced by them personally. *Parker v. Borock*, 5 N. Y. 2d 156, 160 (1959).

There are "great variations" in seniority provisions of collective bargaining agreements. *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U. S. 521, 526 (1949).

The two-year collective agreement in this case preserved respondents' seniority for a period of three years after continuous layoff and conferred employment rights

thereafter in their favor in preference to new employees.<sup>2</sup> In the circumstances respondents' seniority rights were retained to November, 1960, and respondents were entitled to a preference in employment at the Bethlehem plant. Petitioner's hiring of new employees there, while refusing to employ respondents with seniority, constituted a breach of the agreement. The fact that the agreement expired after respondents' layoff did not alter this result since their seniority rights clearly survived the expiration of the contract period. It is not novel doctrine that rights accrued or arising during the effective period of a collective bargaining agreement are not terminated merely because the period of the agreement has run out. *In re Willow Cafeterias*, 111 F. 2d 429 (2d Cir. 1940); *Owens v. Press Publishing Co.*, 20 N. J. 537 (1956); *Matter of Potoker (Brooklyn Eagle)*, 286 App. Div. 733, 736 (1st Dept. 1955), aff'd 2 N. Y. 2d 553, 560 (1957), cert. den. 355 U. S. 883 (1957).<sup>3</sup>

Nor was petitioner excused from its contractual obligation to recognize respondents' seniority rights under the

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<sup>2</sup> Petitioner's preliminary contention that this was not a layoff but a termination of employment (Petition, p. 8) overlooks the fact that the seniority provisions of the contract refer to "continuous layoff". Moreover, it begs the question at issue: did petitioner have the contractual right to terminate respondents' employment in the circumstances here involved? 1 Williston on Contracts (3rd ed. 1957), § 39A. Petitioner's dismissal of respondents during the life of the contract in anticipation of relocation of the Elmhurst plant was in any event a layoff. *In re Public Ledger*, 161 F. 2nd 762 (3rd Cir. 1947); *McNamara v. The Mayor, etc.*, 152 N. Y. 228 (1897).

<sup>3</sup> In the arbitration proceeding which followed the judicial proceedings in *Matter of Potoker (Brooklyn Eagle)*, Professor W. Willard Wirtz, the arbitrator, in a comprehensive review of the contract and the applicable legal authorities, held that an employer cannot terminate its accrued contract obligations toward employees by terminating the contract and discontinuing business operations. *Brooklyn Eagle, Inc.*, 32 Lab. Arb. 156 (1959).

agreement because it relocated its plant. See *Metal Polishers Local 44 v. Viking Equipment Co.*, 278 F. 2d 142 (3rd Cir. 1960). The seniority provisions of the agreement were applicable to the situation here involved; petitioner was not altogether discontinuing business, but merely shifting operations from one site to another; at the new location it continued to manufacture the same products as it had manufactured at the old, and with use of much of the machinery and equipment used by it at the former plant. Respondents' personal rights of seniority earned by length of service, were not completely destroyed by petitioner's act of shifting its plant from one place to another. The Court of Appeals so held. To have construed the contract otherwise in this case would have substantially deprived the seniority provisions of meaning.

The case involves no substantial questions of federal substantive law, and heretofore no claim to this effect was at any time made by petitioner. The issues were presented and the case argued on the basis of applicable state law and, we believe, correctly so.

First, federal jurisdiction was not and could not be invoked under §301 of the Labor Management Relations Act (61 Stat. 156, Title 29 U. S. C. §185), since this action was brought by individual employees for the protection of rights which are uniquely personal. *Association of Westinghouse Employees v. Westinghouse Electric Corp.*, 348 U. S. 437, 460-461 (1955), rhg. den. 349 U. S. 925 (1955). See *Schattle v. International Alliance, etc.*, 84 F. Supp. 669, 672 (D. C. S. D. Calif., 1949), affd. 182 F. 2d 158, 164 (9th Cir. 1950), cert. den. 340 U. S. 827 (1950), rhg. den. 340 U. S. 885 (1950); *Local Lodge No. 2040 etc. v. Servel, Inc.*, 268 F. 2d 692, 695-7 (7th Cir. 1959), cert. den. 361 U. S. 884 (1959); *United Steelworkers v. Pullman-Standard Car Mfg. Co.*, 241 F. 2d 547 (3rd Cir.

1957); *Silverton v. Valley Transit Cement Co.*, 249 F. 2d 409 (9th Cir. 1957).

The rule of *Westinghouse* has not been impaired by *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957).<sup>4</sup> In the latter case this Court pointed out that *Westinghouse* "is quite a different case" because it involved individual rights of employees, p. 456, fn. 6. Since the case at bar involves individual seniority rights of employees, there is no valid basis for petitioner's assumption that, contrary to *Westinghouse*, a labor organization would be permitted to invoke federal jurisdiction under §301 for the enforcement of such rights or that federal substantive law is applicable. Moreover, the holding of *Lincoln Mills* is expressly limited to "suits under §301(a)."

Nor does this case involve any unfair labor practice or the right of employees to organize and bargain collectively. Cf. *N. L. R. B. v. Rapid Bindery, Inc.*, .... F. 2d .... (2d Cir., July 11, 1961), 48 LRRM 2658.

Petitioner's contention that for it to have recognized the seniority of respondents at the Bethlehem plant "might well have constituted an unfair labor practice", an interference in the selection of a collective bargaining agent for the Bethlehem plant employees, is speculative and unsubstantial; indeed, this argument necessarily implies that

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<sup>4</sup> This question was not argued in the Court of Appeals, but Chief Judge Lumbard, in his dissent, said:

"The parties have assumed here that the Supreme Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957) did not *sub silentio* overrule the distinction between 'individual' and 'union' rights announced in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Co.*, 348 U. S. 437, 461 (1955)."

whenever an employer enters into an agreement which provides expressly for inter-plant transfer of seniority, he may likewise be committing an unfair labor practice. Such a position is, of course, untenable. We must note in passing that petitioner's reference (Petition, page 5, footnote 1) to the selection of a different collective bargaining agent by the Bethlehem plant employees (a statement also made by several parties who have moved for leave to file briefs as *amicus curiae*) finds no basis in the record. The Court of Appeals in fact stated:

“The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement, at the time the plant was opened.”

For the reasons stated this case is not one which presents questions of substance under federal law requiring resolution by this Court. The case was properly decided by the Court of Appeals on the basis of a construction of the contractual provisions here involved and the application of the pertinent law. The position taken by the District Court and the dissenting judge in the Court of Appeals—that an explicit provision for inter-plant transfer of seniority rights is indispensable to the recognition of respondents' rights—is based upon a construction of the contract which is not, we believe, warranted. As stated by Professor Archibald Cox in *Reflections Upon Labor Arbitration*, 72 Harv. L. R. 1482 (1959), “verbal incompleteness is inevitable in drafting collective bargaining agreements.” He notes (at pp. 1491-1492):

“A collective bargaining agreement rarely expresses all the rights and duties falling within its scope. One cannot spell out every detail of life in an industrial establishment.”

And, declares Professor Cox, "the process of interpretation [of a collective bargaining agreement] cannot be the same [as in the case of a deed or promissory note or corporate trust indenture] because the conditions which determine the character of the instruments are different."

**B. There is no conflict of decisions.**

Petitioner's contention that the decision of the Court of Appeals in this case collides with decisions in the Fifth, Sixth and Seventh Circuits will not survive critical examination.

*System Federation No. 59 v. Louisiana & A. Ry.*, 119 F. 2d 509 (5th Cir. 1941), cert. den. 314 U. S. 656 (1941) was an action for loss of wages resulting from a claimed denial of seniority rights under a 1929 contract. The seniority provisions, quoted in the opinion, *did not extend beyond the contract period*, as they do in the case at bar. Further, the 1929 contract was completely abrogated in 1931 and in lieu thereof other seniority rules were set up, effective up to 1937 when an agreement was entered into confirming and settling the seniority established by the rules.

It was in view of these circumstances that the court said that the 1929 seniority provisions did not indefinitely continue to exist after abrogation of the contract and the substitution of other seniority rules, later confirmed by another agreement. In the case at bar, by contrast, three-year seniority provisions extend beyond the termination date of the agreement, preference over new employees is recognized, and these provisions have not been superseded by others as in the case cited. There is thus no conflict with the *System Federation* case.

*Elder v. N. Y. Central R. R. Co.*, 152 F. 2d 361 (6th Cir. 1945) was an action to recover wages lost by reason of

a claimed unlawful deprivation of seniority rights. The critical factor leading to the decision in the cited case was that the seniority provisions relied on *were modified by mutual agreement between the union and the employer* so as to deny the employee the rights asserted. In the case at bar, on the other hand, there was no modification of respondents' seniority rights, as the Court of Appeals pointed out, so as to deprive respondents of those rights. There is thus no conflict with the *Elder* case.

*Local Lodge No. 2040, etc. v. Servel, Inc.*, 268 F. 2d 692 (7th Cir. 1959), cert den. 361 U. S. 884 (1959) is basically different from the case at bar among other respects, in that the employer there *completely discontinued all manufacturing operations* and did not merely shift them from one site to another, as in the case at bar. Because of the factual distinctions the issues in *Servel* were different. Involved in *Servel* were (1) whether the discharge of employees in the circumstances was made without just cause in violation of the collective agreement, and (2) whether a two-year seniority provision gave the employees vested rights in fringe benefits for such period.<sup>5</sup> The court declared (p. 698):

“Contrary to appellants’ contention, we find nothing in the agreement providing for permanent layoff status to those employees or giving vested rights to seniority for two years following their layoff.” (Emphasis the court’s.)

In marked contrast, the agreement at bar *does afford permanent, indefinite layoff* status by the provision that

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<sup>5</sup> Since there was no possibility of re-employment by Servel, all of the employer's operations having completely terminated, the employees could not obtain the fringe benefits by continued employment. Thus, they had to claim vested rights in those benefits at the time of discharge, although quite clearly the benefits had not in fact then vested.

"Employees whose seniority is terminated due to continuous layoff shall receive first preference for employment before new employees are hired."  
(Article XI, sec. 6(c))

Moreover, there is an unconditional right to seniority in the provision that in case of continuous layoff, seniority is preserved for a three-year period. There is thus no conflict with the *Servel* case.

Upon analysis, it is evident that there is no real conflict of decision upon the same subject matter. Substantial variations exist among the cases which readily differentiate them. Accordingly, petitioner's allegation that a conflict is present which requires settlement by this Court cannot be established.

## II

**Judge Madden's participation in this case does not nullify the judgment of the Court of Appeals. The Act of July 28, 1953, 67 Stat. 266, Title 28 U. S. C. §171, which declares the Court of Claims to be an Article III Court is constitutional.**

The statute cited provides *inter alia* with respect to the Court of Claims:

"Such court is hereby declared to be a court established under article III of the Constitution of the United States."

Petitioner contends that the statute is unconstitutional, and that participation in this case by Judge Madden of the Court of Claims, who was designated in January 1961 "to perform judicial duties"<sup>6</sup> in the Court of Appeals for

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<sup>6</sup> 72 Stat. 848, Title 28 U. S. C. §293(a).

the Second Circuit and who heard the appeal herein on February 8, 1961, vitiated the judgment of the Court of Appeals.

Petitioner offers no reasons to support its claim that Congress lacked the power to enact the 1953 statute, but apparently takes the position that only a constitutional amendment can establish the character of the Court of Claims as an Article III court. We submit that petitioner's contention is palpably unsubstantial.

Certainly nothing could be plainer than the background and the language of the statute as to its purpose to declare that the Court of Claims is an Article III court. 1953 U. S. Code Cong. & Adm. News, p. 2006 (83rd Cong., 1st Sess., House Report No. 695). This is within the power of Congress.

Congress possessed not less than two powers under which it might have created the Court of Claims. One was the power to pay the debts of the United States, granted by Article I of the Constitution. In addition, Article III, Section 1 provides that Congress may establish inferior courts to exercise the judicial power. Article III, Section 2 provides that

"The judicial Power of the United States shall extend \* \* \* to Controversies to which the United States shall be a Party \* \* \*."

The United States is a party in all cases in the Court of Claims. Manifestly, therefore, Congress could declare that the Court of Claims is an inferior court which exercises the judicial power as defined in Article III.

As stated in the House Report (*supra* p. 2009):

" \* \* \* it would certainly seem proper for the body which created the Court of Claims to declare

whether, in the creation of it, Congress intended to exercise Article I or Article III power."

Congress has validly exercised its power to declare that the Court of Claims is an Article III court.

### CONCLUSION

**For the foregoing reasons this petition for a writ of certiorari should be denied.**

August 15, 1961.

Respectfully submitted,

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*Counsel for Respondents.*

HARRY KATZ,  
SAHN, SHAPIRO & EPSTEIN,  
*Of Counsel.*

FILED  
AUG 17 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION, a Foreign Corporation,  
*Petitioner,*

AGAINST

OLGA ZDANOK, JOHN ZACHARCYK, MARY A.  
HACKETT, QUITMAN WILLIAMS and MARCELLE  
KREISCHER,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

**OBJECTIONS OF RESPONDENTS TO MOTIONS FOR  
LEAVE TO FILE BRIEFS AS *AMICUS CURIAE***

---

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IN THE  
**Supreme Court of the United States**

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,  
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---

**OBJECTIONS OF RESPONDENTS TO MOTIONS FOR  
LEAVE TO FILE BRIEFS AS *AMICUS CURIAE***

---

**Statement**

Respondents object to the motions for leave to file  
briefs as *amicus curiae* made by the following organizations:

American Spice Trade Association  
California Manufacturers Association  
Chamber of Commerce of Cleveland, Ohio  
Chamber of Commerce of the United States

Georgia State Chamber of Commerce

Illinois State Chamber of Commerce

Institute of Shortening and Edible Oils, Inc.

National Association of Margarine Manufacturers

National Paint, Varnish and Lacquer Association, Inc.

Ohio Chamber of Commerce

Inasmuch as the grounds advanced in support of the several motions are generally similar, respondents for convenience ask leave to file their objections to all of the motions under a single cover.

It is noted that respondents have consented to the filing of a brief as *amicus curiae* by the Pennsylvania State Chamber of Commerce, which states that it plays "an important role in influencing the business climate" of Pennsylvania. Because this is the state to which petitioner removed its plant, the Pennsylvania State Chamber of Commerce may be thought to have a particular interest in this case not shared by the moving organizations.

### **Reasons for Objections**

Respondents have withheld consent to the filing of briefs as *amicus curiae* by the moving parties, for the following reasons:

#### **I**

The moving parties do not have an interest in this case of a sufficiently particular nature to justify their intervention. Were these organizations, which are composed of businessmen and employers, permitted to file briefs, literally thousands of similar associations who claim the same broad and indefinite interest might with equal standing assert the same privilege.

Respondents do not believe that a better understanding of the legal questions in this case will necessarily be promoted by the filing of a substantial number of briefs. Respondents do believe that such arguments as are within the interests of associations of this class will be found presented by the Pennsylvania State Chamber of Commerce in its brief as *amicus curiae*.

## II

All of the facts and questions of law presented by the moving parties have been advanced and argued by petitioner in the courts below and in this Court. No reason is offered to support a valid belief that any of those matters have not been, or will not be presented adequately by petitioner.

Respondents have set forth their position as to those matters in their brief in opposition to the petition for certiorari, and further discussion thereof at this point is therefore believed to be unnecessary.

## III

The moving parties in seeking to establish the importance of this case have stated, among other things, that the Court of Appeals decision will spawn confusion, disrupt labor relations, threaten an employer's right to manage his affairs and retard industrial development.

It is difficult to accept the view that any of these serious consequences will flow from the Court of Appeals decision. This case was decided upon its own facts and upon a construction of the seniority provisions of the collective agreement here involved. There are "great variations" in seniority provisions of collective bargaining agreements. *Aeronautical Industrial Dist. Lodge 727*

v. Campbell, 337 U. S. 521, 526 (1949). A construction of one type of provision is not dispositive of all others. The moving parties are themselves in disagreement as to the nature of seniority provisions in use. Such provisions are, for example, described by them as "standard",<sup>1</sup> "vary[ing] widely",<sup>2</sup> "similar",<sup>3</sup> "not unique" and subject to "no common industry practice".<sup>4</sup>

In the circumstances, respondents cannot perceive that the disastrous consequences envisaged by the moving organizations will come to pass.

The Court of Appeals decision in this case will not prevent any employer from relocating his plant nor will it bar him from selecting any site for a new plant that he desires. It will not interfere with his relations with employees at a new plant, if in fact he already has any such employees there—or with the right of his employees to select their bargaining representative.

The Court of Appeals decision in this case will only require an employer in similar circumstances, to recognize his employees' seniority rights under a collective bargaining agreement earned by years of service in his employ. It will only require him in such situation to offer to re-employ them at the relocated plant before he hires new employees there who have no seniority.

Viewed realistically, the decision in this case construing the provisions of this contract scarcely presents the picture of drastic confusion painted by the moving parties. The true picture is one of adherence to a contractual obligation.

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<sup>1</sup> Ohio Chamber of Commerce, page 2.

<sup>2</sup> Chamber of Commerce of the United States, page 5.

<sup>3</sup> Chamber of Commerce of Cleveland, Ohio, page 1.

<sup>4</sup> National Association of Margarine Manufacturers, page 3. "Each collective bargaining agreement is tailored to a particular case, and they differ widely." *Ibid.*

## CONCLUSION

**The motions for leave to file briefs as *amicus curiae* should be denied.**

August 15, 1961.

Respectfully submitted,

MORRIS SHAPIRO,  
*Counsel for Respondents.*

HARRY KATZ,  
SAHN, SHAPIRO & EPSTEIN,  
*Of Counsel.*

AUG 22 1961

JAMES R. BROWNING, Clerk

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1961

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION, A Foreign Corporation,

*Petitioner,*

*v.*

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS and MARCELLE  
KREISCHER, \_\_\_\_\_  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MARVIN JONES, CHIEF JUDGE OF THE  
UNITED STATES COURT OF CLAIMS, AND SAMUEL  
E. WHITAKER, J. WARREN MADDEN, DON N. LARA-  
MORE AND JAMES R. DURFEE, JUDGES OF THE  
UNITED STATES COURT OF CLAIMS, AS AMICI  
CURIAE.

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IN THE  
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**OCTOBER TERM, 1961**

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**THE GLIDDEN COMPANY, DURKEE FAMOUS  
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UNITED STATES COURT OF CLAIMS, AND SAMUEL  
E. WHITAKER, J. WARREN MADDEN, DON N. LARA-  
MORE AND JAMES R. DURFEE, JUDGES OF THE  
UNITED STATES COURT OF CLAIMS, AS AMICI  
CURIAE.**

Petitioner and respondents have consented in writing  
to the filing of this brief pursuant to Rule 42.

**Interest of Amici Curiae**

The judgment of the Court of Appeals for the Second  
Circuit was rendered by a panel which included Judge J.  
Warren Madden of the United States Court of Claims,

sitting by designation as authorized by 28 U.S.C. § 293(a). The questions presented by the Petition for A Writ of Certiorari include the following: "(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?" In connection with the question thus presented petitioner contends that: the Court of Claims, as held in *Williams v. United States*, 289 U.S. 553, is a legislative and not a constitutional court; a 1953 statute, 67 Stat. 226, 28 U.S.C. § 171, declaring the Court of Claims "to be a court established under article III of the Constitution of the United States," is unconstitutional; the assignment statute is unconstitutional insofar as it authorizes the Chief Justice to designate judges of the Court of Claims for temporary service on constitutional courts such as the Court of Appeals for the Second Circuit; and therefore Judge Madden's participation in the judgment below is prohibited by the Constitution and vitiates the judgment.

The important constitutional issues thus presented by the Petition directly affect the Judges of the Court of Claims. Their right to serve on other constitutional courts, pursuant to designation by the Chief Justice under the assignment statute, is questioned, and doubt is cast upon their right to enjoy the benefits and protections conferred by Article III of the Constitution upon judges of constitutional courts. The Judges of the Court of Claims believe that prompt determination of these issues by the Supreme Court will contribute to the preservation of the integrity of the judicial system, and therefore have taken this opportunity to present certain additional reasons for the grant of a writ of certiorari insofar as question (d) of the Petition is concerned. The other questions raised in the Petition do not concern the Judges of the Court of Claims and no views are expressed herein with respect to whether the writ should also extend to such questions.

It is noted that 28 U.S.C. § 2403 may be applicable since question (d) draws into question the constitutionality of an Act of Congress affecting the public interest, and that no court has certified such fact to the Attorney General.

**Reasons for Granting the Writ with Respect to Question  
(d) Presented by the Petition**

The constitutional issues raised by petitioner are important to the administration of justice in the narrowest sense of that term. The machinery for administering justice is itself the subject of petitioner's attack. Under the assignment statutes, judges of the Court of Claims may be assigned for temporary service on the district courts and courts of appeals, and judges of those courts (and retired justices of this Court) may be assigned for temporary service on the Court of Claims. Such assignments have been made on a number of occasions in the past, including the assignment of Judge Madden which is directly in question, and the better administration of justice may require such assignments in the future if permissible under the Constitution. The propriety of such assignments, both past and future, and the validity of judgments participated in by assigned judges, will be clouded until such time as the constitutional issues raised by petitioner are settled by this Court.

The distinction between legislative and constitutional courts has been confused and has resulted in a number of vexatious problems ever since the legislative-court doctrine was extended from the territorial courts to include the Court of Customs and Patent Appeals, by *Ex Parte Bakelite Corporation*, 279 U.S. 438, and the Court of Claims, by *Williams v. United States*, 289 U.S. 553. See, e.g., the various opinions in *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582. The correctness of those decisions has been ques-

tioned by the Solicitor General in *Pope v. United States*, 323 U.S. 1, and in *Lurk v. United States*, 366 U.S. 712, although this Court did not deem it necessary to decide the issue under the circumstances of those cases. The Congress has attempted to clear up this confusion and resolve any problems concerning the operation of the assignment statutes and otherwise by expressly declaring that the Court of Claims and the Court of Customs and Patent Appeals, as well as the Customs Court, are constitutional courts created under Article III of the Constitution. 28 U.S.C. §§ 171, 211, 251. The power of the Congress to do this has been questioned by petitioner and involves an important constitutional issue which we believe should be decided by this Court.

We think it appropriate for these constitutional issues to be decided in this case, and therefore urge that the Petition be granted insofar as question (d) presented therein is concerned. The constitutional provisions involved are not broad grants of power affecting the general operation of the Government, as to which the accumulation of additional experience and avoidance of decision until necessary may be desirable. Rather, they are technical provisions relating to the establishment and operation of the judicial system itself and present problems which are peculiarly within the competence of this Court to resolve. We see no advantage that can be derived from further delay in deciding whether judges of the Court of Claims can be assigned to serve on other constitutional courts such as the Court of Appeals for the Second Circuit. The continued existence of doubts about this practice can only impair the confidence of the public in our judicial system, and render suspect the validity of decisions made or participated in by assigned judges. If the existing practice is wrong, certainly it should be stopped as soon as pos-

sible. If it is entirely proper, as we believe, much needless controversy and uncertainty will be avoided by so deciding in this case.

Petitioner apparently did not bring to the attention of the Court of Appeals the objection now made to Judge Madden's participation in the hearing and decision of that court. But as Mr. Justice Frankfurter noted in his dissent on other grounds in the *Lurk* case, *supra* at p. 713, the question raised by petitioner is jurisdictional in nature. Such a jurisdictional point may be raised at any time. See e.g., *McGrath v. Kristensen*, 340 U.S. 162, 167. If Judge Madden, because of constitutional prohibitions, was not competent to serve, as petitioner contends, the judgment in which he participated is null and void. *United States v. American-Foreign SS. Corp.*, 363 U.S. 685; *Ayrshire Corp. v. United States*, 331 U.S. 132; *Frad v. Kelly*, 302 U.S. 312. Thus, in the *Ayrshire Corp.* case this Court held that a judgment rendered without the participation of all three members of a three-judge court, contrary to a statutory prohibition, was void and should be vacated even though the issue had not been raised before the three-judge court.

In *Amer. Const. Co. v. Jacksonville Railway*, 148 U.S. 372, there was a contention that one of the judges who participated in the hearing and decision of the case by the Circuit Court of Appeals was prohibited from such participation by a statutory provision. This Court stated that: "If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or *certiorari*." *Id.*, at p. 387. The fact that a constitutional rather than a statutory prohibition is claimed to be applicable here cannot be a material distinction. Thus,

we submit that the competency of Judge Madden to participate in the judgment below may be and should be reviewed by this Court, and therefore that certiorari should be granted with respect to question (d) of the Petition.

While this is not an appropriate occasion for a detailed discussion of the merits of petitioner's contention, we should make clear our conviction that petitioner is wrong on the merits of the issue and that Judge Madden's participation in the hearing and decision of the Court of Appeals was entirely proper. As shown in the brief filed last term in the *Lurk* case on behalf of the Judges of the Court of Claims as *amici curiae*, the *Williams* case erred in holding that the Court of Claims was created as a legislative rather than a constitutional court. Moreover, the 1953 statute declaring the Court of Claims to be a court created under Article III of the Constitution is constitutional and establishes the present status of the Court of Claims as a constitutional court even if *Williams* was correctly decided at the time. See *Postmaster-General v. Early*, 12 Wheat. 136, 148. If the Court of Claims is a constitutional court, as we believe, its judges, including Judge Madden, unquestionably may be assigned to serve on other constitutional courts such as the Court of Appeals for the Second Circuit.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE

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OCTOBER TERM, 1961.

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No. 242.

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*against*

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KREISCHER,

*Respondents.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

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## PETITIONER'S REPLY BRIEF.

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---

**PETITIONER'S REPLY BRIEF.**

I.

**There is a conflict between the decision here and the decisions in other circuits.**

At pages 12, 13 and 14 of their brief in opposition to the granting of the petition for certiorari, respondents say that the Court of Appeals decision here is not in conflict with the decisions of the Fifth, Sixth and Seventh Circuits i.e. *Local Lodge 2040, International Association of Machinists v. Servel*, 268 F. 2d 692 (C. A. 7th Cir. 1959), cert. den. 361 U. S. 884 (1959); *System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co.*, 119 F. 2d 509 (C. A. 5th Cir. 1941), cert. den. 314 U. S. 656 (1941); *Elder v. N. Y. Central R.R. Co.*, 152 F. 2d 361 (C. A. 6th Cir. 1945).

It is true that the facts in those cases are not identical with the facts in the instant case. However, the underlying rationale of these cases is that seniority rights exist *only* during the term of the collective bargaining agreement providing therefore, or *only* during the term of an employer and employee relationship, and that *upon the termination of either the collective bargaining agreement or of the employer and employee relationship such rights cease to exist.*

For example, in *Servel* the employees contended that when they were notified of the discontinuance of the manufacturing operations by Servel and of their discharge,

" \* \* \* they then achieved the status of laid-off employees with two years seniority from the time of layoff as provided in the agreement. They also contend that this status gave such employees the vested right to maintain their group life insurance during the two years, their hospitalization insurance for one year, the right to certain wage benefits and the right to retire under the pension plan if they reached the age of 65 years during this two year period following layoff during which they retained seniority" 152 F. 2d, at 697.

It is stated by the Seventh Circuit at page 698:

"Contrary to appellants' contention, we find nothing in the agreement providing for a permanent [emphasis in original] layoff status to these employees or giving vested rights to seniority for two years following their layoff. Seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence, and the right of seniority is not inconsistent with the right of an employer to discharge its employee [emphasis added]."

In this case respondents' employment was in fact permanently terminated, concededly in good faith.<sup>1</sup> There was no layoff,<sup>2</sup> as erroneously assumed by Judge Madden and as erroneously stated by respondents.

---

<sup>1</sup> See p. 8 of petition; vol. 1 pp. 89a and 90a of certified record.

<sup>2</sup> See p. 8 of petition. Footnote 2 on page 8 of respondents' brief in opposition refers to the provision in the collective bargaining agreement relating to "continuous layoff" and says that petitioner overlooks this provision in stating that there was a termination of employment. The fact in this record which cannot be ignored is that *there was not a layoff* of any of these respondents. There was a termination of employment as noted in the record referred to. There is no evidence in the record to suggest otherwise.

Respondents say in this same footnote that petitioner "\*\*\*\*" begs the question at issue: did petitioner have the contractual right to terminate respondents' employment in the circumstances here involved?" Of course there is no provision in the collective bargaining agreement specifically granting to petitioner the right to terminate respondents' employment in the circumstances here involved. Petitioner's right to terminate respondents' employment (subject only to the provisions of the collective bargaining agreement containing no pertinent restrictive provisions covering the circumstances here involved) has never been questioned either in the pleadings here or in the arbitration proceedings where the collective bargaining agent of respondents attempted unsuccessfully, 10 Misc 2d (N. Y.) 700; 172 N. Y. S. 2d 678 (1958), to secure arbitration with respect to matters identical to the matters in issue here. Indeed, the petitioner's right to terminate respondents' employment in the circumstances here involved is universally recognized in law without a specific contract provision therefor. *Local Union 600 v. Ford Motor Company*, 113 F. Supp. 834 (USDCED, Mich. SD 1953); *Auto Workers v. Federal Pacific Co.*, 36 LRRM 2357 (USDC -D. Conn. 1955) (not officially reported); *Parker v. Borock*, 5 NY 2d 156 (1959); *Matter of Kosoff*, 276 App. Div. (N. Y.) 621 (1st Dept. 1950)—aff'd 303 N. Y. 663 (1951); *Paul v. Mencher*, 169 Misc. 657 (Sup. Ct. N. Y. Co. 1937)—aff'd 254 App. Div. (N. Y.) 851 (1st Dept. 1938)—leave to appeal den., 279 N. Y. 813 (1938). And, of course, and more significantly, there was no contractual provision that petitioner would continue respondents or other employees in its employment for any length of time so that seniority rights or other rights under plans beneficial to them could mature or that respondents' employment could not be terminated upon the termination of the collective bargaining agreement or upon the closing of operations at Elmhurst where they had been employed.

Of course, the foregoing is merely a brief discussion of merits relating to matters which may be urged and answered more fully upon the granting of certiorari.

The reasoning of *Servel* applies equally and with the same force to the facts in this case.

In *System Federation* the Fifth Circuit stated at page 515:

"The only question with which we are here concerned is whether the seniority rights claimed, arise out, and exist, because of, the 1929 contract, and persist during and only during its term, or whether they indefinitely continue to exist after it has been abrogated, and the relations of employer and employee are no longer fixed and being carried on, under that contract, but for many years under rules, promulgated by the company, and later under a contract between the company and the union which affirms that it 'covers all understandings now in effect.' "

It was there decided by the Fifth Circuit at page 515:

"On this point the authorities are uniform. They settle it that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions. Authorities, supra. The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term. After the termination of the 1929 contract, those who remained in the employ of the defendant, or came into it afterwards, held their tenure and such rights as they had, not under the 1929 contract, but at first under the company rules and later under the 1937 contract, and none of them can claim rights contrary thereto."

The reasoning of *System Federation* that rights of seniority apply *only* during the existence of the collective bargaining agreement out of which such rights might arise applies equally and with the same force to the facts in

this case. Upon the termination of that agreement in accordance with its provisions, seniority rights likewise were terminated and the termination of the relationship of employer and employee terminated any rights to seniority.

In *Elder* a series of collective bargaining agreements provided certain seniority rights in favor of employees including plaintiff. Plaintiff was laid off while his rights to seniority were still in effect, but during such layoff, the employer and the collective bargaining agent made a new agreement (in conjunction with a consolidation of certain offices of the employer) under which it was agreed that the employment of plaintiff and others was terminated. Plaintiff brought suit to recover wages of which he claimed he had been deprived by reason of his termination, on the ground that such termination was in violation of his seniority rights. The Sixth Circuit stated, at page 364:

“The seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable economic security, of which he may not be unlawfully deprived. The right, however, is not inherent. It must stem either from a statute or a lawful administrative regulation made pursuant thereto, or from a contract between employer and employee, or from a collective bargaining agreement between employees and their employer. In the absence of statute, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment. In the instant case, the appellant rests upon no right created by statute, but solely upon a collective bargaining agreement, made between the chosen representative of the workers and the employer. The fact that he was not a member of the union labor organization which

lawfully bargained for him and for all other employees of the company neither strengthens nor weakens his position. His individual seniority rights were both created and limited by the bargain which was made for and was binding upon all employees for whom it was made. \* \* \* \*

"As was pointed out in *System Federation No. 59* \* \* \* the authorities are uniform to the effect that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions."

There again as pointed out with respect to *System Federation*, the reasoning was that seniority rights ceased upon the termination of the agreement out of which such rights might arise or upon the termination of the relationship of employer and employee.

The reasoning in each of these cases supports the contention made by petitioner that the decision of the Court of Appeals here is in conflict with the aforesaid decisions of the Fifth, Sixth and Seventh Circuit Courts of Appeal.

The conflict should be resolved by this Court.

## II.

### **The importance of the questions.**

At pages 7 to 12 of their brief in opposition, respondents say that no important question of federal law is involved.

That important questions of substantive federal law are involved which should be reviewed by this Court has been demonstrated in the petition.

The widespread importance of these questions has been suggested by the motions made and memoranda submitted

by various associations asking leave to appear as *amici curiae* on the petitioner's petition for a writ of certiorari, as follows:

American Spice Trade Association  
California Manufacturers Association  
Chamber of Commerce of the City of Cleveland, Ohio  
Chamber of Commerce of the United States  
Georgia State Chamber of Commerce  
Illinois State Chamber of Commerce  
Institute of Shortening and Edible Oils, Inc.  
National Association of Margarine Manufacturers  
National Paint, Varnish and Lacquer Association,  
Inc.  
Ohio State Chamber of Commerce

Pennsylvania State Chamber of Commerce has filed its brief as *amicus curiae* on consent of petitioner and respondents.

The judges of the United States Court of Claims have filed their brief as *amici curiae* on consent of petitioner and respondents requesting this Court to grant the petition insofar as it seeks a review of the question as to whether participation by a Court of Claims judge vitiates the judgment of the Court of Appeals.

The widespread importance of these questions is also demonstrated by the editorial columns of Mr. Arthur Krock appearing in The New York Times for July 21, 1961 and August 18, 1961, entitled respectively "In The Nation—Jobs as 'Vested Rights' Despite Location Changes", (Vol. CX, No. 37,799, p. 22, col. 6) and "In The Nation—Issue of Judicial Power to Rewrite Labor Contracts," (Vol. CX, No. 37,827, p. 20, col. 3). A copy of Mr. Krock's article of August 18, 1961 is attached hereto for the convenience of the Court.

Reference is also made to articles appearing in the Wall Street Journal dated July 13, 1961 (Vol. CLVIII, No. 8, p. 2, cols. 2, 3 and 4) entitled "UAW Asks Voice In Ford Decisions on Factory Sites" and "Auto Union Studies More Suits to Ensure Worker Transfer Rights as Plants Move", and dated July 21, 1961 (Vol. CLVIII, No. 14, p. 1, col. 8) entitled "Glidden Co. Contests Union Claim to 'Vested' Rights to Plant Jobs".

From the foregoing it is clear that the questions sought by petitioner to be reviewed by this Court are of widespread importance.

For all the reasons urged this Court is requested to grant the petition for certiorari.

Dated: New York, N. Y.  
September 6, 1961.

Respectfully Submitted,

CHESTER BORDEAU,  
Attorney for Petitioner.

WHITE & CASE,  
Of Counsel.

*The New York Times*, August 18, 1961

Vol. CX, No. 37,827,  
page 20, Col. 3

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In The Nation.<sup>3</sup>

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**Issue of Judicial Power to Rewrite Labor Contracts**

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By ARTHUR KROCK

The many groups of this country whose interests have been fundamentally affected by a recent United States Court of Appeals ruling in *Zdanok v. the Glidden Company* have been slow to awaken to this reality. But the awakening has occurred as a consequence of studies of the decision that have since been circulated increasingly among industrialists, labor unions and communities seeking to accelerate local employment. Hence an unusually large, important and anxious audience now awaits the disposition the Supreme Court will make at its forthcoming term of the plea the Glidden Company has filed for review of the lower court's findings.

In effect, the Federal Court of Appeals in New York, reversing a United States district judge, held that certain employees acquire vested seniority rights to their jobs in perpetuity, even though (1) the contract of management with their union has expired; (2) their work has been terminated by the closing of the plant covered in the contract; and (3) the matter of such vested job rights was never a subject of the collective bargaining by which the contract was agreed to.

The issues raised in this decision include: the right of management to close or geographically transfer a plant in pursuance of its judgment that the health of the business requires the action; the right of employees who are not carried to the new location, or who decline to transfer there,

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<sup>3</sup> Reprinted with permission of The New York Times Company, the publisher.

to collect damages from the company; the right of a company to execute a bilateral agreement with a community to move its plant there and recruit its employes locally in exchange for tax and other incentives; and the power of the Federal judiciary to rewrite management-labor contracts reached in collective bargaining.

The events which have entangled industry, unions, cities and more than 100,000 existing labor contracts in this legal jungle were these:

### **Case Background.**

1. In 1957 the Glidden Company closed a food-processing plant at Elmhurst, N. Y., terminating employment there and established the operation at Bethlehem, Pa. The actions were consistent with the terms of the then existing contract between the company and the union. The move was in the interest of economy and efficiency, and was not motivated by lower tax offers, land gifts or other incentives from the city of Bethlehem.

2. The company gave long advance notice of its transfer intentions, attempted to sell the Elmhurst facilities to other food-processing companies, offered to consider all Elmhurst employes for transfer, signed up two who applied, and assisted others to find jobs.

3. Five Elmhurst plant employes sued the company for damages on the ground that implied in the contract (which had expired) was the acquirement of seniority rights to jobs; and that these rights, the product of extended contractual service, survived the expiration of the contract or any geographical change in the plant's location, or any change of union representation by employes at the point of relocation.

4. The Federal district court found for the company on its certification that it had never bargained with the union for transferable seniority rights, that nothing touch-

ing on the claim was in the Elmhurst contract and that, moreover, the contract had expired. On appeal this decision was reversed.

If the Supreme Court declines to review the issues, or, after reviewing them, sustains the Court of Appeals, free play will be given to the operation of factors involved that can impede economic growth, competitive enterprise, the system of collective bargaining and existing contracts made thereby, and create a state of industrial confusion.

Should the Supreme Court leave this situation standing, however, it can be corrected by Congress since the grounding of the appeals court decision appears to be in equity and the implications found in long service, not in the Constitution of the United States. This should commend the situation for study to the team of forty-eight House Republicans, led by Representative Curtis of Missouri. It has just compiled a program designed to produce industrial policies "whose application (with maximum employment) will harness the productive potential of the nation to the initiative of our people."

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS  
FOODS DIVISION, a Foreign Corporation,  
*Petitioner,*

AGAINST

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A.  
HACKETT, QUITMAN WILLIAMS and MARCELLE  
KREISCHER,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**RESPONDENTS' SUPPLEMENTAL BRIEF**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

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No. 242

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,  
a Foreign Corporation,

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*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

**RESPONDENTS' SUPPLEMENTAL BRIEF**

Petitioner's reply brief urges that the petition for a writ of certiorari be granted because of (1) a conflict of decision among the circuits, and (2) the widespread importance of the case.

With respect to the first point, we believe that petitioner has submitted no additional matter in its reply brief which has not been heretofore fully answered in respondents' brief in opposition to the petition for certiorari. Marked factual differences between this case and the cases in the other circuits readily distinguish them. Thus

there is not a true conflict of decision upon the same subject matter which requires resolution by this Court.

With respect to the second point, petitioner now cites as evidence of the importance of the questions involved (a) the ten motions made by trade associations and chambers of commerce, of several of which petitioner is concededly a member, for leave to file *amicus* briefs in support of petitioner's position, and (b) two columns by Mr. Arthur Krock concerning this case which appeared in The New York Times, and articles which appeared on two dates in the Wall Street Journal, one of them dealing with this case. Mr. Krock's column of August 18, 1961 is reprinted in full by petitioner at pages 9-11 of its reply brief.

Neither the multiplicity of motions nor the newspaper stories furnish a proper basis for determining whether or not an important question of federal law is involved which requires settlement by this Court. Since petitioner asserts, however, that these are relevant factors for consideration by the Court, we believe it is pertinent to note that counsel for the moving organizations have informed us that their attention was directed to this case by petitioner itself through the medium of a 10-page publicity release which it distributed throughout the country. We further believe, on the basis of our examination of the publicity release, that the newspaper stories concerning this case were for the most part based upon that release.

We, therefore, take issue with petitioner's statements that "the widespread importance of these questions has been suggested by the motions made" and "the widespread importance of these questions is also demonstrated by the editorial columns of Mr. Arthur Krock". We suggest that petitioner cannot offer those matters to this

Court in proof of the importance of the case when they represent an interest generated solely by acts of petitioner itself.

It will be noted that although the decision of the Court of Appeals was handed down on March 28, 1961, the newspaper stories were not published until several months afterward. Such belated acknowledgment of the decision by two newspapers published daily in the city in which the decision was rendered scarcely furnishes convincing proof of its widespread importance.

Concerning Mr. Krock's column, reproduced in full in petitioner's reply brief, we do not feel it is appropriate to comment. However, because the column has been placed before the Court, we feel impelled to observe that in it Mr. Krock has made numerous errors of fact, proven by the record, as well as several statements alleged as fact which are wholly outside the record.

**The petition for a writ of certiorari should be denied.**

September 15, 1961.

Respectfully submitted,

MORRIS SHAPIRO,  
*Counsel for Respondents.*

HARRY KATZ,  
SAHN, SHAPIRO & EPSTEIN,  
*Of Counsel.*

FILED

OCT 16 1961

JAMES R. BROWNING, CLERK

No. 242

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In the Supreme Court of the United States

OCTOBER TERM, 1961

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, A FOREIGN CORPORATION, PETITIONER

v.

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKITT,  
QUITMAN WILLIAMS AND MARCELLE KREISCHER

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

PETITION OF THE UNITED STATES FOR INTERVENTION

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ARCHIBALD COX,  
Solicitor General,  
Department of Justice,  
Washington 25, D.C.

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# In the Supreme Court of the United States

OCTOBER TERM, 1961

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No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS  
DIVISION, A FOREIGN CORPORATION, PETITIONER

v.

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKETT,  
QUITMAN WILLIAMS AND MARCELLE KREISCHER

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

## PETITION OF THE UNITED STATES FOR INTERVENTION

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On October 9, 1961, this Court certified to the Attorney General of the United States that the constitutionality of the Act of July 28, 1953, 67 Stat. 226, 28 U.S.C. 171, is drawn in question in this case.

The Solicitor General, on behalf of the United States, prays that an order be entered permitting the United States to intervene and become a party for the purpose of filing a brief and presenting oral argument, pursuant to 28 U.S.C. 2403, in support of the constitutionality of the statute.

Respectfully submitted.

ARCHIBALD COX,  
*Solicitor General.*

OCTOBER 1961.

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JOHN F. DAVIS, CLERK

# Supreme Court of the United States

OCTOBER TERM, 1961.

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No. 242.

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THE GLIDDEN COMPANY, etc.,

*Petitioner,*

*vs.*

OLGA ZDANOK, *et al.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## PETITIONER'S BRIEF.

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# Supreme Court of the United States

OCTOBER TERM, 1961.

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No. 242.

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THE GLIDDEN COMPANY, etc.,

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vs.

OLGA ZDANOK, *et al.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

## PETITIONER'S BRIEF.

The opinion and judgment of the United States District Court, Southern District of New York, in favor of petitioner, is reported at 185 F. Supp. 441.

The opinion of Honorable J. Warren Madden, Judge of the United States Court of Claims, sitting by designation in the United States Court of Appeals for the Second Circuit, concurred in by Honorable Sterry R. Waterman, Circuit Judge, reversing the judgment of the Southern District Court and remanding the case for further proceedings not inconsistent therewith, and the dissenting opinion of Honorable J. Edward Lumbard, Chief Judge, are reported at 288 F. 2d 99, 105, and at pages 1 to 12 of the transcript.

### **Jurisdiction.**

The statutory provision conferring jurisdiction on this Court is Title 28 of the United States Code, §1254(1).

On October 9, 1961, this Court entered an order (368 U. S. 814 (1961)) granting the petition for certiorari to the United States Court of Appeals for the Second Circuit limited to question (d) presented by the petitioner

(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?

### **Constitutional Provisions and Statutes Involved.**

The pertinent text of the Constitution of the United States, Article I, sections 1 and 8, Article III, sections 1 and 2, and Amendment V, together with that of sections 171, 293a, 1491, 1492, 1494 to 1505, 2509, and 2510, of Title 28 of the United States Code is set forth in the appendix hereto. The Constitutional provisions appear at pages 1a to 4a. The provisions of Title 28 appear at pages 5a to 7a.

### **The Question Presented for Review.**

Does the participation of a United States Court of Claims judge in the hearing and determination of an appeal duly taken to the United States Court of Appeals for the Second Circuit, from a judgment of the United States District Court for the Southern District of New York, in a diversity case within the jurisdiction of said courts in virtue of the judicial powers granted under Article III of the Constitution of the United States, vitiate the judgment of the Court of Appeals?

### **Statement of the Case.**

Respondents commenced this action in the Supreme Court of the State of New York, New York County. The action was removed to the United States District Court for the Southern District of New York upon the ground that that court had jurisdiction by reason of the requisite diversity of citizenship among the parties and the requisite amount in controversy. Each of the five respondents claimed damages for an alleged breach of a collective bargaining agreement between petitioner and the collective bargaining agent of respondents and other former employees of petitioner.

After a trial without a jury (the respondents having waived a jury trial as to the question of liability but reserving the right to trial by jury as to the amount of damages) Honorable Edmund L. Palmieri, the trial judge, ordered judgment for petitioner concluding his opinion by stating:

“In sum, under the circumstances presented in this case, where no relevant limitation on the employer’s freedom of action is found in the agreement or the prior conduct of the parties, no policy of New York law or our national labor laws requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant.” 185 F. Supp. at page 449.

Respondents thereafter duly presented this case for review to the Court of Appeals for the Second Circuit. The membership of that court was composed of Chief Judge Lumbard and Circuit Judge Waterman of the Second Circuit, and Judge Madden of the United States Court of Claims sitting by designation. The opinion of the court was rendered by Judge Madden who held that respondents had

earned vested seniority rights which endured after the termination in good faith of the agreement under which provision was made therefor and after termination in good faith of the employment of respondents.

Chief Judge Lumbard dissented, stating that the agreement did not provide that the employees had the right to "follow the work" to the new site and that seniority rights did not endure beyond the termination of the collective bargaining agreement. 288 F. 2d at page 105.<sup>1</sup>

### **Summary of Petitioner's Argument.**

Petitioner's argument is summarized as follows:

1. *The characteristics of the Court of Claims establish it as an Article I or Legislative Court as distinguished from an Article III Court vested with the Judicial Power of the United States.*

The nature and character of a court are determined by the functions and powers granted to it.

In Article I of the Constitution of the United States there are enumerated the legislative powers exclusively granted to Congress. Some of these powers are delegable to agencies, boards, commissions, corporations or courts which may be created by Congress as " \* \* \* necessary and proper for carrying into Execution the foregoing Powers \* \* \*."

Such agencies, boards, commissions, corporations or courts, as instrumentalities of Congress in carrying out the powers granted to it by Article I, may be eliminated by Congress at any time in its discretion, and the powers so

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<sup>1</sup> See, Columbia Law Review, Vol. 61, No. 7, at pages 1363 *et seq.* (November, 1961).

delegated may be performed by other instrumentalities selected by Congress, or Congress may determine to exercise these powers directly without the use of any instrumentality.

The functions and powers of the Court of Claims, set forth in sections 1491, 1492, 1494 to 1505, 2509 and 2510 of Title 28 of the United States Code, are distinctly functions and powers which among others have been granted by Article I exclusively to Congress.

These functions and powers so granted to the Court of Claims by Congress establish its character as an Article I court performing legislative functions and powers under Article I, as an instrumentality of Congress.

The Court of Claims having been granted only functions and powers of Congress under Article I is an Article I or legislative court.

Section 1 of Article III of the Constitution provides that

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. \* \* \*,

Section 2 of Article III enumerates and limits the types of cases and controversies with reference to which the judicial functions and powers of the United States shall be extended.

The Court of Appeals for the Second Circuit is concededly an Article III court vested with the function and power to hear and determine cases or controversies enumerated in section 2 of Article III.

The functions and powers of the Supreme Court as established by the Constitution and of the inferior courts created by Congress under Article III are clearly judicial and not legislative.

*2. The participation by Judge Madden in the hearing and determination of the appeal in the Court of Appeals for the Second Circuit vitiated the judgment of that court.*

To attempt to authorize a judicial court composed of a judge or judges of an Article I legislative court to hear and determine common law cases or controversies where a diversity of citizenship appears offends and violates Article III of the Constitution and Amendment V thereto.

Section 1 of Article III provides that the judges of the Supreme Court and of such inferior courts as Congress may from time to time ordain and establish

“shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

By reason of this provision in section 1 of Article III the Congress is without power to alter the tenure of office of such judges of Article III courts during their good behaviour, and without power to diminish their compensation during their continuance in office.

There is no equivalent provision in Article I pertaining to the members of such agencies, boards, commissions, corporations or courts which might be created by Congress to assist it in performing its legislative functions and powers.

Such provision is made in Article III of the Constitution in order to create an independent judiciary and thereby maintain a separation of powers as contemplated by the Constitution.

The Court of Appeals for the Second Circuit because of the participation of Judge Madden of the Court of Claims, a court created under the legislative powers of

Congress, was an improperly constituted court and accordingly lacked jurisdiction and power to determine this appeal, and its judgment is vitiated and a nullity.

The parties to this case are entitled under Amendment V to have a controversy of the type before this Court heard and determined by a court composed of judges possessing the functions and powers of an Article III court. Otherwise, they are deprived of their "property without due process of law."

The question of jurisdiction of the Court of Appeals may be raised at any time in this proceeding.

### **Argument.**

On January 7, 1941, President Franklin D. Roosevelt issued a commission to Judge Madden reading as follows:

**"PRESIDENT OF THE UNITED STATES OF AMERICA**

"To all who shall see these Presents, Greeting:

"KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Joseph Warren Madden, of Pennsylvania, I have nominated, and, by and with the advice and consent of the Senate, do appoint him Judge of the United States Court of Claims, and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Joseph Warren Madden, during his good behavior.

"In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

"Done at the City of Washington this seventh day of January, in the year of our Lord one thousand

nine hundred and forty one, and of the Independence of the United States of America the one hundred and sixty fifth."

By the President:

Franklin D. Roosevelt

Robert H. Jackson  
Attorney General.

Judge Madden was sworn in and entered upon his duties as Judge of the United States Court of Claims on January 8, 1941, and continued to perform such duties to and beyond the time of his participation in the hearing and determination of the appeal argued before the United States Court of Appeals for the Second Circuit on February 8, 1961.

On January 25, 1961, Honorable Earl Warren, Chief Justice of the United States, in a designation and assignment<sup>2</sup> filed with the Clerk of the Court of Appeals on January 27, 1961, stated in part:

"Now, therefore, pursuant to the authority vested in me by Title 28, United States Code, §293(a), I do hereby designate and assign the Honorable J. Warren Madden to serve as a Circuit Judge of the Court of Appeals for the Second Circuit for the period aforesaid [commencing February 6, 1961 and ending February 11, 1961], and for such further time as may be required to complete unfinished business."

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<sup>2</sup> See appendix, page 8a.

## I.

**The characteristics of the Court of Claims establish it as an Article I or Legislative Court as distinguished from an Article III Court vested with the Judicial Power of the United States.**

*a. The functions and the powers of the Court of Claims establish it as an Article I or legislative court.*

The functions and the powers of the Court of Claims of the United States are provided for in sections 1491, 1492, 1494 to 1505, 2509 and 2510 of Title 28 of the United States Code (see appendix, pages 5a to 7a).

Article I of the Constitution of the United States provides in section 1 thereof "All legislative Powers herein granted shall be vested in a Congress of the United States, \*\*\*." And in section 8 thereof "The Congress shall have Power \* \* \* to pay the Debts \* \* \* of the United States; \*\*\*."

It will be noted that the Court of Claims has the functions and the power under sections 1492 and 2509 to report to Congress the facts of a case referred to it by Congress in any bill, except a bill for a pension, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed or facts claimed to excuse the claimants for not having resorted to any established legal remedy. It may report also to either House of Congress conclusions sufficient "to inform Congress whether the demand is legal or equitable or a gratuity."<sup>3</sup>

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<sup>3</sup>Of course, under Article III a court does not have the function or the power to make reports to Congress as contemplated by sections 1492 and 2509 of Title 28 of the United States Code, or to exercise any other function or power of a non-judicial nature. See, e.g. *Muskrat v. United States*, 219 U. S. 346 (1911). Also, cf. section 2510 of Title 28 of the United States Code.

From the foregoing statement of the functions and the powers of the Court of Claims it is clear that its character is that of a body created to act as an arm of Congress in the performance of its legislative functions and powers and not that of an independent judicial court under Article III of the Constitution.

It is clear that the Court of Claims does not have the function or the power to determine a controversy of the nature of the case before this Court. Therefore, a judge of the Court of Claims does not have the function or the power to participate in the hearing and determination of this controversy.

*b. This Court has held squarely that the Court of Claims is an Article I or legislative court.*

The distinction between Article I and Article III courts was first noted by Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511 (1828). It was there emphasized that Article I courts "were incapable of receiving" any of the judicial power of the United States stemming from Article III of the Constitution with which Article III courts were vested.

In *Williams v. United States*, 289 U. S. 553 (1933), in an unanimous opinion, this Court held squarely that the United States Court of Claims is a court created pursuant to Article I of the Constitution and as such the judges of that court are not protected by the provisions of Article III of the Constitution relating to tenure of office and compensation. In reaching its decision in the *Williams* case, this Court relied heavily upon the ruling in *Ex parte Bakelite Corp.*,<sup>4</sup> 279 U. S. 438 (1929), which held that the United States Court of Customs Appeals was an Article I court.

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<sup>4</sup> In *Bakelite* the petitioner sought a writ of prohibition to the Court of Customs Appeals prohibiting it from entertaining an appeal from the findings of the Tariff Commissioner. It was held that the Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties.

In *Williams* it was pointed out at page 565:

"\*\*\* that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. \*\*\* The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution."

At pages 568, 569, Mr. Justice Sutherland, speaking for the Court, quoted from the opinion of this Court in *Bakelite*:

"It [the Court of Claims] was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies."

Mr. Justice Sutherland noted there that this Court in *Bakelite* pointed out that the Court of Claims is, and always has been

"\*\*\* as Congress declared at the outset, 'a court for the investigation of claims against the United States'; that none of the matters made cognizable by the court inherently or necessarily requires judicial determination, but on the contrary 'all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Con-

gress.' It is noted as significant that the act constituting the court dispenses with trial by jury, a provision which was distinctly upheld in spite of the Seventh Amendment in *McElrath v. United States*, 102 U. S. 426."

This Court in *Williams* stated at page 580:

"And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article. That is to say, a power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers. \* \* \*,

And, in concluding his opinion, Mr. Justice Sutherland stated at page 581:

"From whatever point of view the question be regarded, the conclusion is inevitable that the Court of Claims receives no authority and its judges no rights from the judicial article of the Constitution, but that the court derives its being and its powers and the judges their rights from the acts of Congress passed in pursuance of other and distinct constitutional provisions."<sup>5</sup>

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<sup>5</sup> Expressions contained in earlier opinions of this Court were rejected unanimously in *Williams*. "None of these cases involved the question now under consideration, and the expressions referred to were clearly *obiter dicta*, which, as said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399, 'may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" See page 568.

On the same day this Court decided *Williams, O'Donoghue v. United States*, 289 U. S. 516 (1933) was decided. *Bakelite* was recognized in the majority and dissenting opinions in *O'Donoghue* as correctly decided.

Each of the four opinions in *National Mutual Life Insurance Co. v. Tidewater Transfer Co., Inc.*,<sup>6</sup> 337 U. S. 582, decided in 1949, recognized that *Williams* was correctly decided and relied upon it in part in arriving at the respective conclusions.

*c. The declaration by Congress that the Court of Claims is an Article III court is ineffectual.*

Section 171 of Title 28 of the United States Code was amended on July 28, 1953, 67 Stat. 226 by the addition of the last sentence contained therein

"The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims. Such court is hereby declared to be a court established under article III of the Constitution of the United States."

The functions and the powers of the Court of Claims provided for in sections 1491, 1492, 1494 to 1505, 2509 and 2510 are distinctly functions and powers, which among others, have been granted by Article I exclusively to Congress. That court does not possess the function or the power to hear and determine the cases and controversies referred to in section 2 of Article III of the Constitution.

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<sup>6</sup>In *Tidewater*, a District of Columbia corporation instituted in the Federal District Court for Maryland an action against a Virginia corporation wherein jurisdiction depended solely on diversity of citizenship. The Supreme Court held the Act which confers jurisdiction on federal district courts over civil actions between citizens of the District of Columbia and citizens of a State to be constitutional.

The amendment to section 171 of Title 28 of the U. S. Code on July 28, 1953, cannot be construed to grant to the Court of Claims the function and the power to hear and determine cases and controversies of the types provided for in section 2 of Article III. The jurisdiction, the function and the power of the Court of Claims have not been changed.<sup>7</sup>

If it was the intent of the Congress to create the Court of Claims under Article III of the Constitution of the United States, then the Congress must have granted to the Court of Claims and its judges the function and the power to hear and determine all cases in law and equity arising under the Constitution, the laws of the United States and treaties made or which shall be made under their authority; all cases of admiralty and maritime jurisdiction;—*between citizens of different states*;—and between citizens of the same state claiming lands in different states.

But, certainly no court should so construe the declaration of Congress.

The judicial power defined in Article III of the Constitution, however, does not depend upon nor is it derived from the will of Congress; it is expressly and solely vested

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<sup>7</sup> Except the repeal of section 1493 of Title 28 of the United States Code relating to departmental reference cases. It is noted that section 1492 relating to Congressional reference cases was not repealed. The repeal of section 1493 and the retention of section 1492 demonstrate that Congress intentionally, contrary to its declaration, in fact, retained in the Court of Claims a concededly non-judicial function.

The declaration by Congress did not pretend to enlarge the functions and the powers of the Court of Claims. The declaration is not contained in Chapter 29 of Title 28 of the United States Code relating to the jurisdiction of the Court of Claims. Rather, it is contained in Chapter 7 of Title 28 relating to Court of Claims and specifically to section 171 thereof captioned "Appointment and Number of Judges; Character of Court". The "Character of Court" caption was added on September 3, 1954, 68 Stat. 1240.

in virtue of Article III, and in no sense may it be vested in any administrative agency. *Toth v. Quarles*, 350 U. S. 11 (1955).

The action of Congress in 1953 in stating that the Court of Claims "is hereby declared to be a court established under Article III of the Constitution of the United States" was taken without granting any Article III judicial powers to either the court or its judges. The basic character of the court as one organized as an arm of Congress in the exercise of its legislative powers, was unchanged (see footnote 8 on page 18).

It is very clear that Congress is completely without power under the Constitution to alter the status of an Article I court *merely* by declaration of intention as to its constitutional status made many years after the court's creation. In other words, a court assumes a definite status at the time of its establishment and, absent changes in the character, function, power or jurisdiction of that court, such status constitutionally does not and can not change. (*Ex parte Bakelite Corp.*, 279 U. S. 438 (1929); *Williams v. United States*, 289 U. S. 553 (1933); *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949).)

House Report No. 695, 83rd Congress, 1st Session, (1953) relating to the amendment to Section 171 of Chapter 7 of Title 28 of the United States Code enacted on July 28, 1953 declaring the United States Court of Claims to be a court established under Article III of the Constitution, states at page 3:

"It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under article III. (See Congressional Globe, 33d Cong., 2d sess., pp. 71, 72, 105-106, 110, 111, 113,

and 114.) On these pages are statements by Senators Brodhead, Hunter, Pratt, Clayton, Douglas, and Stuart, indicating that Congress intended to create a court under the power granted it by article III to create inferior courts."

An examination of the Congressional Globe demonstrates, however, that the Senate debates to which reference was made by no means support the conclusion that the Congress intended to create the Court of Claims under Article III. On the contrary, the debates clearly establish that the court was created to perform the functions and the powers of Congress granted to it by Article I.<sup>8</sup> (Congressional Globe, 33rd Congress, 2d Session (1854) pp. 106, 107, 110-112.)

Furthermore, any expression on the part of Congress as to whether or not it intended the Court of Claims to be created as an Article I or Article III court is fairly irrelevant when consideration is given to the *acts of Congress in*

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<sup>8</sup> For example, at page 70 of the Congressional Globe, *ibid*, Senator Brodhead, the Chairman of the Committee of Claims and author of the bill, which was also handled by him on the floor of the Senate stated in part:

"Population doubles in this country every 23 or 24 years. The business before Congress, and especially that of a private character, increases in the same ratio. \* \* \* Want of time leads to improper legislation and often to great injustice. Those who have honest claims are postponed for years. Justice is cheated by long delay; \* \* \*. The pressure of business of a private character prevents us from considering great questions in a way becoming statesmen representing this great people, and this extended empire. Our time is too valuable to be occupied in discussing the merits or demerits of a private bill. Frequently, we dispute about the facts of a case prepared in an *ex parte* way, the truth of which could be better ascertained by a tribunal differently constituted."

Also see statements by Senator (later Chief Justice) Salmon P. Chase at page 112; statement by Senator Butler at page 112; and statement by Senator Weller at page 110, Congressional Globe, *ibid*.

creating the Court of Claims as a court to assist in performing the functions and the powers granted by the Constitution to the Congress. The acts of Congress creating the Court of Claims establish that court as a legislative court and not an Article III court.

The status of a court depends not on the intention of Congress but on the function and the power with which the court, in actuality, was vested. Without a change in the functions and the powers or jurisdiction of the court, Congress cannot constitutionally change the fundamental character of an Article I legislative court to that of an Article III court merely by a declaration of intention.

As stated by Mr. Justice Van Devanter in *Bakelite*, 279 U. S. 438 (1928) at page 459:

"It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court [as manifested by the grant of functions and powers] was created and in the jurisdiction conferred."

It was argued to this Court in *Bakelite* that Congress, in making provision for temporary assignments of circuit and district judges to the Court of Customs Appeals, intended thereby that such court should be a judicial or Article III court, for otherwise such assignments would be inadmissible under the Constitution. In refutation of this argument Mr. Justice Van Devanter speaking for the Court stated at page 460:

"But if there be constitutional obstacles to assigning judges of constitutional [Article III] courts to legislative [Article I] courts, the provision cited is for that reason invalid and cannot be saved on the theory that Congress intended the court [the Court

of Customs Appeals] to be in one class when under the Constitution it belongs in another."

It is a "settled principle that where a controversy is of such a character as to require the exercise of the judicial power *defined by Art. III*, jurisdiction thereof can be conferred only on courts established in virtue of that article, and that Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since, to repeat the language of Chief Justice Marshall in *American Insurance Co. v. Canter, supra*, 'they are incapable of receiving it.' " *Williams v. United States, supra*, at page 578.

It is clear from the foregoing that the Court of Claims is an Article I legislative court. The declaration by Congress in 1953 to the contrary is ineffectual where it appears, as here, that in fact its functions and powers are granted in pursuance of the legislative powers of Congress and not the judicial power of Article III.

*d. The distinctions between Article I and Article III courts.*

The characteristics of the Court of Claims establish it as an Article I or legislative court. These characteristics demonstrate the fundamental distinctions between the functions and the powers of Article I judges and judges of the judicial courts under Article III. The significant distinction is that the Court of Claims as a legislative court does not exercise any function or power which was not granted in the first instance to the Congress by section 8 of Article I and delegated by Congress to that court. It has not been granted the function and the power to hear and determine cases and controversies which are granted exclusively to Article III courts under section 2 of that Article.

In contrast, Article III courts have the function and power granted to them by Congress under the Constitution to hear and determine cases and controversies enumerated in Section 2 of Article III. Article III courts may not exercise any power or function which in the first instance has been granted to Congress by Article I.

The Court of Claims as a legislative court has the function and the power under Article I to hear and determine cases and controversies to which the United States of America is a defendant. Article III courts in the exercise of the judicial power of the United States also may have the function and the power to hear and determine certain controversies in which the United States of America is a party. The Court of Claims has not been granted the function or the power to hear and determine cases and controversies enumerated in section 2 of Article III.<sup>9</sup>

And, of course, an Article III court clearly does not have the function or power to act with respect to Congressional reference cases. Section 1492 of Title 28 of the United States Code.

In 1953 by amendment to section 171 of Title 28 of the United States Code the following sentence was added to that section by Congress, "The Court of Claims is hereby declared a court established under Article III of the Constitution of the United States." As demonstrated, the Court of Claims is and has been an Article I legislative court and not an Article III court.

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<sup>9</sup>As said by Mr. Justice Vinson in *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949) at page 643:

"There is no anomaly, \* \* \* in the fact that legislative [Article I] courts, as well as constitutional [Article III] courts, \* \* \* sometimes exercise concurrent jurisdiction over the same matters. That does not make the former constitutional courts \* \* \*."

In 1956 Congress amended sections 291(a) and added a new subsection (e) to section 292 of Title 28 of the United States Code to provide that the Chief Justice of the United States, upon presentation of a certificate of necessity by the chief judge or circuit justice of any circuit wherein a need arises, may designate and assign temporarily any judge of the Court of Claims to sit in any circuit or district court. In 1958, these provisions were reenacted and consolidated into present section 293(a).

By this legislation in 1956 and 1958 Congress did not change the functions or the powers of the Court of Claims, its legislative instrumentality, or of the judges of that court.

Such legislation constitutionally could not vest Judge Madden with functions or powers to determine cases or controversies enumerated in section 2 of Article III.

### III.

**The participation by Judge Madden in the hearing and determination of the appeal in the Court of Appeals for the Second Circuit vitiated the judgment of that court.**

On January 7, 1941, Judge Madden was appointed a judge of the United States Court of Claims. He was authorized and empowered by that appointment

"\* \* \* to execute and fulfill the duties of that office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the power, privileges and emoluments to the same of right appertaining, unto Him, the said Joseph Warren Madden, during his good behavior."

The functions and the powers of the Court of Claims are discussed fully in point I hereof. Those functions and powers do not include the functions and power to hear and determine cases or controversies of the type before this Court.

The determination of a court not properly constituted under Article III of the Constitution operates to deprive persons of their property without due process of law in violation of the Amendment V. *Kilbourn v. Thompson*, 103 U. S. 168, 182 (1880).

The Court of Appeals for the Second Circuit hearing and determining the appeal in this case was composed of three judges, two of whom (Chief Judge Lumbard and Circuit Judge Waterman) were vested with the function and power to hear and determine cases and controversies of the type before this court. The third, Judge Madden, was without that function or power.

It has been basic law since Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*, 1 Pet. 511 (1828), that Article I courts are "incapable of receiving" Article III judicial power. Or, as stated by this Court in *Williams*, a legislative court "receives no authority and its judges no rights from the judicial article of the Constitution." (289 U. S., at 581).

Certainly, Judge Madden never received any Article III power in virtue of his 1941 appointment, confirmation and subsequent service on the Court of Claims, and he was "incapable of receiving" such power merely in virtue of his *temporary* designation and assignment under section 293(a) of Title 28 of the United States Code to the Court of Appeals for the Second Circuit.

Such *temporary* designation and assignment of an Article I court judge to an Article III court would disregard the constitutional protection provided for Article III judges

in their tenure of office, a protection not constitutionally provided for Article I judges.

Authorizing Article I judges to hear and determine controversies between citizens of different states, such as the controversy before this Court, would allow a judge holding his office for a term or at the will of Congress under Article I, to hear and determine cases or controversies which only judges whose powers are beyond the reach of Congress may hear and determine under Article III of the Constitution.

Accordingly, if Congress is permitted to enact legislation which would authorize the designation and assignment of judges of Article I courts to sit in Article III courts, its action would be in derogation of the separation of powers contained in the Constitution.

The judges participating in the hearing and determination of a case or controversy described in section 2 of Article III are required not only to be vested with the function and power to hear and determine such cases and controversies but also must be independent of, and insulated from, the influence of the legislative branch of Government.

Section 1 of Article III provides for such independence and insulation by constitutionally protecting judges of Article III courts from diminution in tenure of office and compensation.

The Honorable Roger B. Taney, Chief Justice of the United States, in a letter dated February 16, 1863, to Honorable S. P. Chase, Secretary of the Treasury, later Chief Justice of the United States, in connection with an act of Congress imposing a tax on the salaries of all officers in the employment of the United States and the construction placed upon such act by the Secretary of the Treasury to embrace judicial officers, stated

"The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments." 157 U. S. 701, 702.

*Accord: Evans v. Gore*, 253 U. S. 245 (1920) at page 257; *Kilbourn v. Thompson*, 103 U. S. 168 (1880) at pages 190-191; *The Federalist*, Nos. 78 and 79 (Hamilton).<sup>10</sup>

From the foregoing, it is clear that the Court of Appeals for the Second Circuit did not have the function or the power to hear and determine the appeal argued before it on February 8, 1961, when Judge Madden of the Court of Claims sat by assignment and designation. *United States v. American-Foreign Steamship Corp.*, 363 U. S. 685, 691 (1960); *Ayrshire Collieries Corp. v. United States*, 331 U. S. 132, 141 (1947); *Frad v. Kelly*, 302 U. S. 312, 316-319

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<sup>10</sup> See, *The Federalist*, Modern Library Edition, New York, pp. 502 and 512, respectively.

(1937); *American Construction Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 387 (1893).

The jurisdiction of the Court of Appeals, with Judge Madden participating, was lacking.

And of course the question of lack of jurisdiction may be raised at any time in the proceeding. *McGrath v. Kristensen*, 340 U. S. 162, 167 (1950).

As said by Circuit Judge Hicks in *Manning v. Ketcham*, 58 F. 2d 948 (CCA 6th 1932), at page 949:

"When a judge acts in the clear absence of all jurisdiction, i.e., of authority to act officially over the subject-matter in hand, the proceeding is *coram non judice*. In such a case the judge has lost his judicial function, has become a mere private person, \* \* \*. Such has been the law from the days of the case of *The Marshalsea*, 10 Coke 68. It was recognized as such in *Bradley v. Fisher*, 13 Wall. (80 U. S.) 335, 351, 20 L. Ed. 646. In *State ex rel. Egan v. Wolever*, 127 Ind. 306, 26 N. E. 762, 763, the court said:

"\* \* \* Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.' "

Where constitutional limitations have not been adhered to, they still are to be applied in all their vigor, without concern for the fate of earlier judgments made by courts improperly constituted and without jurisdiction, function or power to make such judgments.

As stated by Mr. Justice Frankfurter in his dissenting opinion (not in disagreement in this respect with the majority) in *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949) at p. 655:

"\* \* \* If there is one subject as to which this Court ought not to feel inhibited in passing on the validity of legislation by doubts of its own competence to judge what Congress has done, it is legislation

affecting the jurisdiction of the federal courts. When Congress on a rare occasion through inadvertence or generosity exceeds those limitations, this Court should not good-naturedly ignore such a transgression of congressional powers.”<sup>11</sup>

Constitutional principles relating to the jurisdiction of Article III courts should not be sacrificed “on the altar of expediency”. *National Mutual Insurance Co. v. Tidewater Transfer Co. Inc.*, *supra* at page 645.

### **Conclusion.**

Because of the participation of a judge of an Article I court with two Article III court judges in the hearing and determination of this Article III case by the Court of Appeals for the Second Circuit, the judgment of the Court of Appeals was vitiated and a nullity.

This Court should reverse the judgment of the Court of Appeals for the Second Circuit and remand the case to that court for further proceedings in accordance with law.

Dated: November 30, 1961.

Respectfully submitted,

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<sup>11</sup> See the concurring opinion of Mr. Justice Frankfurter in *Griffin v. Illinois*, 351 U. S. 12 (1956) at pp. 25, 26.

## APPENDIX.

### Constitution of the United States.

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#### ARTICLE I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

*Constitution of the United States.*

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; —And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

*Constitution of the United States.*

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

*Constitution of the United States.*

## AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Title 28 of United States Code.***§171. APPOINTMENT AND NUMBER OF JUDGES; CHARACTER OF COURT.**

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims.

Such court is hereby declared to be a court established under article III of the Constitution of the United States. As amended July 28, 1953, c. 253, §1, 67 Stat. 226; Sept. 3, 1954, c. 1263, §39(a), 68 Stat. 1240.

**§293. JUDGES OF OTHER COURTS.**

(a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

**§1491. CLAIMS AGAINST UNITED STATES GENERALLY; ACTIONS INVOLVING TENNESSEE VALLEY AUTHORITY**

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of

*Title 28 of United States Code.*

1933, as amended, with respect to suits by or against the Authority. As amended July 28, 1953, c. 253, §7, 67 Stat. 226; Sept. 3, 1954, c. 1263, §44(a), (b), 68 Stat. 1241.

**§1492. CONGRESSIONAL REFERENCE CASES**

The Court of Claims shall have jurisdiction to report to either House of Congress on any bill referred to the court by such House, except a bill for a pension, and to render judgment if the claim against the United States represented by the referred bill is one over which the court has jurisdiction under other Acts of Congress. June 25, 1948, c. 646, 62 Stat. 941.

§1494. Accounts of officers, agents or contractors

§1495. Damages for unjust conviction and imprisonment; claim against United States

§1496. Disbursing officers' claims

§1497. Oyster growers, damages from dredging operations

§1498. Patent and copyright cases

§1499. Penalties imposed against contractors under eight hour law

§1500. Pendency of claims in other courts [no jurisdiction]

§1501. Pensions [no jurisdiction]

§1502. Treaty cases [no jurisdiction except as Congress otherwise provides]

§1503. Set-offs [by the United States and judgment in its favor against plaintiffs]

§1504. Tort claims.

The Court of Claims shall have jurisdiction to review by appeal final judgments in the district courts in civil actions based on tort claims brought under section 1346(b)

*Title 28 of United States Code.*

of this title if the notice of appeal filed in the district court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims. June 25, 1948, c. 646, 62 Stat. 942.

§1505. Indian claims.

§2509. Congressional Reference Cases.

Whenever any bill, except for a pension, is referred to the Court of Claims by either House of Congress, such court shall proceed with the same in accordance with its rules and report to such House, the facts in the case, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy.

The court shall also report conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

§2510. Referral of cases by Comptroller General.

The Comptroller General may transmit to the Court of Claims for trial and adjudication any claim or matter of which the Court of Claims might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

The Court of Claims shall proceed with the claims or matters so referred as in other cases pending in such court and shall render judgment thereon. As amended July 28, 1953, c. 253 §11, 67 Stat. 227; Sept. 3, 1954, c. 1263, §47(b), 68 Stat. 1243.

**The Designation and Assignment of Honorable  
J. Warren Madden.**

**Designation of a Judge of the United States Court of  
Claims for Service on the United States Court of  
Appeals for the Second Circuit.**

The Chief Judge of the United States Court of Appeals for the Second Circuit having certified that there is a necessity for the designation and assignment of a Judge of the United States Court of Claims to serve as a Circuit Judge of the United States Court of Appeals for the Second Circuit during the period commencing February 6, 1961 and ending February 11, 1961; and the Honorable Marvin Jones, Chief Judge of the United States Court of Claims, having consented to the assignment of the Honorable J. Warren Madden, a Judge of the United States Court of Claims, to serve as a Circuit Judge of the Court of Appeals for the Second Circuit during the period commencing February 6, 1961 and ending February 11, 1961;

Now, THEREFORE, pursuant to the authority vested in me by Title 28, United States Code, §293(a), I do hereby designate and assign the Honorable J. Warren Madden to serve as a Circuit Judge of the Court of Appeals for the Second Circuit for the period aforesaid, and for such further time as may be required to complete unfinished business.

/s/ **EARL WARREN**  
**Chief Justice of the United States**

Dated, Washington, D. C.:  
Jan. 25, 1961

LE COPY

Office-Supreme Court, U.S.  
FILED

DEC 28 1961

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1961

No. 242

THE GLIDDEN COMPANY, etc.,

*Petitioner,*

vs.

OLGA ZDANOK, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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# Supreme Court of the United States

October Term, 1961

No. 242

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THE GLIDDEN COMPANY, etc.,

*Petitioner,*

vs.

OLGA ZDANOK, et al.,

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF FOR RESPONDENTS

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### Question Presented

The order allowing certiorari limited the writ to the following question (R. 15):

“Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?”

### Statement of the Case

On February 8, 1961 the United States Court of Appeals for the Second Circuit heard oral argument in the case at bar upon an appeal taken by these respondents from a judgment of the United States District Court for the Southern District of New York, rendered in favor of

petitioner herein. The Court of Appeals consisted of Honorable J. Edward Lumbard, Chief Judge, Honorable J. Warren Madden, Judge of the Court of Claims, sitting by designation and Honorable Sterry R. Waterman, Circuit Judge. The appeal was argued on behalf of both sides.

On March 28, 1961 the Court of Appeals rendered its decision, reversing the judgment of the District Court (R. 13). The opinion of the Court of Appeals was written by Judge Madden. Chief Judge Lumbard dissented in a separate opinion. R. 1-12.

Thereafter, petitioner filed petitions in the Court of Appeals for rehearing and for rehearing *in banc*. The applications were denied in their entirety (R. 14-15).

At no stage of the proceedings in the Court of Appeals—either prior to or at the argument of the appeal, or upon the applications for rehearing and rehearing *in banc*—did petitioner raise any objection to Judge Madden's participation in the case. Petitioner's first challenge to Judge Madden's participation was made in this Court in its petition for a writ of certiorari, where it claimed that the judgment of the Court of Appeals was thereby vitiated (Petition, pp. 18-19).

The assignment of Judge Madden to perform judicial duties in the Court of Appeals, which resulted in his participation in the instant case, was made on January 25, 1961 by the Chief Justice of the United States, acting pursuant to 28 U. S. C. §293 (a).

Judge Madden was appointed as a judge of the Court of Claims by the President with the advice and consent of the Senate, to hold office during good behavior. See 28 U. S. C. §§171, 173. He took office on January 8, 1941 (116 F. 2d, XIII).

## Summary of Argument

The judgment of the Court of Appeals is not vitiated by reason of Judge Madden's participation in the hearing and determination of this case, for the following separate and independent reasons:

### I

Judge Madden is a duly qualified judge of the Court of Claims, having been appointed by the President and confirmed by the Senate, and he enjoys life tenure. In participating in the hearing and determination of this case in the Court of Appeals, Judge Madden in good faith performed the normal functions of a *de jure* judicial office, pursuant to designation of the Chief Justice of the United States acting in accordance with the applicable statutes. Under the circumstances, Judge Madden acted at least as a *de facto* judge whose exercise of the functions of the office he occupied under the designation was binding unless challenged in a direct proceeding to try his right to participate as a judge in the Court of Appeals. No direct challenge to his title having been made, a judgment in which he participated may not be collaterally attacked, by reason of his participation, for the first time on appeal by the party adversely affected by the judgment.

### II

The judgment of the Court of Appeals is not vitiated because of Judge Madden's participation for the additional reason that Judge Madden was at all times an Article III judge and qualified to sit on the Court of Appeals, certainly since 1953 when Congress expressly

declared the Court of Claims to be an Article III court (Act of July 28, 1953, c. 253, §1, 67 Stat. 226). He possessed every incident of office attaching to an Article III judge; he performed judicial duties, enjoyed life tenure, and was entitled to compensation fixed by statute. The 1953 Act represents a surrender by Congress of any power to reduce the tenure or diminish the compensation of the judges of the Court of Claims. Under the circumstances, and irrespective of the constitutional status of the Court of Claims, Judge Madden was an Article III judge, fully competent to participate in the hearing and determination of cases in the Court of Appeals.

### III

Reaching the broad constitutional issue here involved, we urge that the participation of Judge Madden in the hearing and determination of this case did not vitiate the judgment of the Court of Appeals, because the Court of Claims, of which Judge Madden is a member, has at all times been, and is now, an inferior court ordained and established by Congress to exercise judicial power under Article III.

The Court of Claims exercises judicial power under Article III in the following instances: (1) cases in law and equity arising under the Constitution and laws of the United States, and (2) controversies to which the United States is a party. Its status as an Article III court is established by analysis of the background, creation and history of the court, which demonstrate the Congressional purpose to constitute it as a court and not as a commission, to give life tenure to its judges, to make its judgments final, to confer concurrent jurisdiction upon the district courts, to bestow appellate jurisdiction on the Court of Claims over certain district court judgments.

Moreover, since the Court of Claims judgments have been established as final, this Court has accepted jurisdiction of appeals from those judgments and, for a continuous period of sixty years up to *Ex parte Bakelite Corporation*, 279 U. S. 438 (1929) and *Williams v. United States*, 289 U. S. 553 (1933), it recognized the Court of Claims as an inferior court exercising judicial power under Article III. In the *Williams* case, however, the Court of Claims was held to be a legislative court created by Congress under its power to pay the debts of the United States, and, notwithstanding its jurisdiction of actions to which the United States is a party, it was held not to exercise judicial power under Article III because the doctrine of sovereign immunity from suit rendered the Article III provision, "Controversies to which the United States shall be a Party", inapplicable to suits *against* the United States.

We urge, with respect, that the *Williams* case was wrongly decided, that no constitutional impediment exists to the judicial determination of claims against the United States under Article III where the sovereign has waived its immunity. The basic jurisdiction of the Court of Claims is judicial in its nature and stems from Article III. The 1953 Act, moreover, which expressly "declared" the Court of Claims "to be a court established under article III of the Constitution of the United States", is entitled to great respect in the resolution of the question whether Congress originally established and ordained the Court of Claims as an inferior court under article III. The Act in any case is clearly capable of being given effect from the date of enactment. In either aspect, the Court of Claims was an Article III court at the time this case was heard and determined by the Court of Appeals, hence Judge Madden's participation was in full conformity with law and the judgment of the Court of Appeals could not thereby be adversely affected.

## ARGUMENT

### I

**Judge Madden was at least a *de facto* judge, whose right to participate may not be collaterally attacked by petitioner for the first time on this appeal.**

Congress, in establishing courts of appeals as inferior courts under Article III of the Constitution, has prescribed that each Court of Appeals shall consist of the circuit judges of the circuit in active service, and further, that the Circuit Justice and "justices or judges designated or assigned shall also be competent to sit as judges of the court." 28 U. S. C. §43(b). The assignment statute here involved, 28 U. S. C. §293(a), provides that the "Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims \* \* \* to perform judicial duties in any circuit \* \* \* in a court of appeals \* \* \*."<sup>1</sup> A judge of the Court of Claims so designated shall discharge all "judicial duties" for which he is assigned and may be required to perform any duty which might be required of a judge of the court to which he is assigned; indeed, a judge acting under a designation "shall have all the powers of a judge of the court \* \* \* to which he is designated and assigned", with exceptions not relevant here. 28 U. S. C. §296.

Cases in the Court of Appeals, other than *in banc* proceedings, are to be heard and determined by a court or

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<sup>1</sup> A judge of the court of claims is a "judge of the United States" within the provisions of the Judicial Code, as is a judge of the court of appeals. 28 U. S. C. §451. Judges of both courts take the same oath of office, 28 U. S. C. §453, are subject to disqualification under the same circumstances, 28 U. S. C. §455, are barred from engaging in the practice of law, 28 U. S. C. §454, may resign or retire under the same conditions, 28 U. S. C. §§371, 372.

division of not more than three judges, of whom a majority constitute a quorum. 28 U. S. C. §46.

The Court of Appeals which heard and determined the appeal in the instant case was composed of the Chief Judge of the circuit, a Circuit Judge, and a Judge of the Court of Claims designated by the Chief Justice, as provided by statute, to perform judicial duties in the circuit. The sole issue here is whether the judgment rendered by the Court of Appeals, so constituted, is void.

At the threshold, we note that no question is raised by petitioner as to Judge Madden's judicial capacity, *i.e.*, his power to act in a judicial capacity in the Court of Claims. He was appointed to that court in 1941 by the President by and with the advice and consent of the Senate, to hold office during good behavior,<sup>2</sup> and he was in active judicial service at the time of his designation.

In authorizing the temporary assignment of judges of the Court of Claims to perform judicial duties in the Court of Appeals, Congress was acting well within its power to constitute tribunals inferior to the Supreme Court. U. S. Const., Art. I, sec. 8, cl. 9; Art. III, sec. 1. In *Lamar v. United States*, 241 U. S. 103 (1916), where a district judge in one circuit was assigned to perform judicial duties in a district in another circuit, in conformity with applicable statutory provisions, it was contended that the assignment constituted an infringement of the power of appointment and confirmation of judges vested by the Constitution in the President and Senate. This Court declared (241 U. S. at p. 118) that merely to state the contention "suffices to demonstrate its absolute unsoundness." The fact that in the instant case the as-

<sup>2</sup> Identical provisions govern the appointment and tenure of circuit judges. 28 U. S. C. §44.

signment was of a Court of Claims judge rather than a district judge is not material, because the common source of authority is the power of Congress to constitute inferior courts—in this instance, the Court of Appeals. Further, there is no question in this case but that the statutory procedures governing the assignment were fulfilled in literal detail.

There was in every respect, therefore, full compliance with all constitutional and statutory requirements for the establishment and formation of the Court of Appeals which heard and determined the appeal in the instant case. That court possessed and exercised jurisdiction over the subject matter of the case and over the parties. Accordingly, no vice of any kind attached to the judgment rendered by it.

Even if doubt existed concerning the validity of the assignment here involved, it is plain that in performing judicial functions in the Court of Appeals, Judge Madden acted at least as a *de facto* judge. It will be noted that as a judge of the Court of Claims his appointment and tenure were identical with those of circuit judges; his assignment to the Court of Appeals was authorized by an Act of Congress; his designation by the Chief Justice to perform judicial duties in the Court of Appeals was in conformity with the statute; he occupied a *de jure* judicial office in good faith; and he performed the judicial duties pertaining to that office. At no stage of the proceedings in the Court of Appeals did petitioner object to Judge Madden's participation in the hearing and determination of the appeal by that court. His participation therein cannot at this time be assailed collaterally by petitioner, by attacking the validity of the judgment rendered by the court.

In *McDowell v. United States*, 159 U. S. 596 (1895), which involved the power of a circuit judge to designate a district judge from one district to sit in another district, this Court said (at pp. 601-602):

“Whatever doubt there may be as to the power of designation attaching in this particular emergency, the fact is that Judge Seymour was acting by virtue of an appointment, regular on its face; and the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.”

The acts of *de facto* officers are held valid upon considerations of policy and necessity—to avoid the “endless confusion” which would result if in any proceeding before a *de facto* officer his title to office could be questioned collaterally. *Norton v. Shelby County*, 118 U. S. 425 (1886). In that case the Court said (at pp. 441-442):

“Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined.”

See also:

*Ball v. United States*, 140 U. S. 118 (1891);  
*Wright v. United States*, 158 U. S. 232 (1895);  
*Starr v. United States*, 164 U. S. 627 (1897);

*Sylvia Lake Co. v. Northern Ore Co.*, 242 N. Y. 144, 147-148 (1926), cert. den. 273 U. S. 695 (1926).

In *Johnson v. Manhattan Ry. Co.*, 61 F. 2d 934 (2d Cir. 1932), aff'd 289 U. S. 479 (1933), the Circuit Court of Appeals for the Second Circuit said concerning this question (per L. Hand, J., at p. 938):

" \* \* \* not all errors go so far to the root as to make the whole proceeding a complete nullity; else the trouble and expense of litigation would go for nothing and controversy never end. Therefore, the law will not scrutinize too nicely a judge's warrant of authority; he may indeed have so little color of office as to stand like a mere interloper, but that is not ordinarily true, if, being duly qualified as a judge, some effort has been made to conform with the formal conditions on which his particular powers depend."

Any challenge to Judge Madden's right to perform judicial functions in the Court of Appeals should have been made in a direct proceeding for that purpose in the nature of *quo warranto* to try his right to the position. The validity of his designation and his participation in the hearing and determination of this case may not be challenged for the first time on appeal from an adverse judgment. *Lamar v. United States*, 241 U. S. 103, 117-118 (1916); *United States v. Marachowsky*, 213 F. 2d 235 (7th Cir. 1954), cert. den. 348 U. S. 826 (1954).<sup>3</sup>

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<sup>3</sup> Cases cited by petitioner for the proposition that the Court of Appeals "did not have the function or the power to hear and determine the appeal" in the instant case by reason of Judge Madden's participation (Pet. Br., p. 23); lend no support to that proposition. *United States v. American-Foreign Steamship Corp.*, 363 U. S. 685 (1960) and *Ayrshire Collieries Corp. v. United States*, 331 U. S. 132 (1947) differ from the case at bar because in those cases there was no *de jure*

## II

**Judge Madden is an Article III judge, and has been so at least since 1953, competent to sit on the Court of Appeals.**

Apart from any question as to the constitutional status of the Court of Claims, it is our position that Judge Madden was an Article III judge competent to sit on the Court of Appeals and to participate in the hearing and determination of this case. Under Article III a judge (1) performs judicial functions; (2) holds office during good behavior; and (3) receives compensation which cannot be diminished during his continuance in office. Judge Madden possessed all of those qualifications at the time of his participation in this case.

First, Judge Madden performed judicial duties. 28 U. S. C. §1491, cf. 28 *id.* §§1331, 1346.

Second, he enjoyed life tenure. 28 U. S. C. §173.

Third, he received compensation, the amount of which may not be diminished during his continuance in office. 28 U. S. C. §§171, 173.

Although the compensation of a judge of the Court of Claims was held subject to reduction in *Williams v. United States*, 289 U. S. 553 (1933), the Act of July 28, 1953, c. 253, §1, 67 Stat. 226, amended §171 of Title 28 of the United States Code by adding the provision that the Court of Claims

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office or court could be said to exist which might be occupied by a *de facto* officer. *Frad v. Kelly*, 302 U. S. 312 (1937) did not involve a *de facto* officer because the judge did not assume to fill a *de jure* office. *American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372 (1893) made no determination on the merits as to the validity of a decree participated in by a judge assertedly incompetent under statute.

"is hereby declared to be a court established under article III of the Constitution of the United States."

The House Judiciary Committee, in recommending passage of H. R. 1070, 83rd Cong. 1st Sess. (H. Report 695), which later became the 1953 Act, declared that, among its purposes

"this measure \* \* \* will protect the independence of the bench of the Court of Claims \* \* \*,

and the committee reiterated in the conclusion of the report that the bill should

"assure the independence of the Court of Claims judiciary \* \* \*,"

The 1953 Act, therefore, in terms and read in light of its background represents a renunciation by Congress of whatever right it may have had to reduce the compensation of judges of the Court of Claims.

Judge Madden enjoys, therefore, the same judicial independence as is possessed by judges of Article III courts, and which it was the purpose of that Article to insure. He was fully competent to participate in the hearing and determination of this case in the Court of Appeals.

No persuasive reason is suggested why a judge so qualified cannot perform judicial duties in an Article III court, even though he may also sit on a court deemed to be legislative in nature. The performance of Article III judicial functions by judges in District of Columbia courts, which also possess administrative and legislative powers under Article I, has been upheld. *O'Donoghue v. United States*, 289 U. S. 516, 545-548 (1933). And this

Court has regularly reviewed determinations of courts thought to be legislative tribunals. *Ex parte Bakelite Corporation*, 279 U. S. 438 (1929); *Williams v. United States*, 289 U. S. 553 (1933); *Pope v. United States*, 323 U. S. 1, 13-14 (1944).

### III

#### **The Court of Claims has exercised judicial power under Article III from earliest days.**

We have urged that, irrespective of the constitutional status of the Court of Claims, the judgment of the Court of Appeals in which Judge Madden participated should stand, because:

- (a) the Court of Appeals was a properly constituted inferior court and Judge Madden participated therein as a *de facto* judge (Point I);
- (b) Judge Madden was an Article III judge competent to participate in the hearing and determination of this case (Point II).

In addition, it is our position that the Court of Claims was in fact ordained and established by Congress as an inferior court to exercise judicial power under Article III, and, at least since the passage of the 1953 Act which declared the court to have been so created, its status as an Article III court is not open to serious question. The decision in *Williams v. United States*, 289 U. S. 553 (1933), holding the Court of Claims to be a legislative court, contrary to earlier views expressed by this Court, was in error, we submit, and should be re-examined.

That the Court of Claims is and at all times has been an Article III court, we propose to show by a review

of its background and history, as well as by the legislative purpose underlying its establishment and the functions exercised by the court.

### 1. Background and creation of the Court of Claims.

The court was established by Congress in 1855 (10 Stat. 612). Although up to that time claims against the United States had been presented to Congress for consideration, early authorities did not regard those matters as falling within the exclusive province of Congress; indeed, it was assumed that the inferior courts could exercise jurisdiction if their decisions were not subject to administrative revision.

See:

*Hayburn's Case*, 2 Dall. 409 (1792);  
*United States v. Ferreira*, 13 How. 40 (1851).

In enacting the bill which established the Court of Claims, Congress evidently held the view that it was establishing an inferior federal court to exercise judicial power under Article III. The original bill which culminated in the 1855 statute proposed the creation of a commission, the members of which were to hold office at the pleasure of the President. By amendment, however, the measure was changed to provide for a "Court of Claims" consisting of three judges who were to hold office during good behavior. The debates provoked the expression of varying opinions as to the nature of the body to be created, particularly since its decisions were not final but were to be reported to Congress. Cong. Globe, 33rd Cong., 2d Sess., pp. 70 *et seq.* The bill, however, was finally adopted in its amended form. In the course of the debates, it is interesting to note that Senator Chase, later a member of this Court when it decided

*Gordon v. United States*, 2 Wall. 561 (1865),<sup>4</sup> expressed the view that "judicial authority" was not being conferred upon the tribunal for the reason that "[j]udicial authority implies power to determine finally upon cases submitted to it" (*id.* at p. 112)—not because the subject matter of the court's jurisdiction consisted of claims against the United States. And, although the legislative court concept had been recognized since *American Insurance Co. v. Canter*, 1 Pet. 511 (1828), in which it had been declared that territorial courts were created under Article I and "incapable of receiving" judicial power under Article III, the debates gave no consideration to the establishment of the new tribunal as an Article I court. It was universally assumed that the Court of Claims would not be inherently precluded from enjoying the status of an Article III court by reason of the fact that its jurisdiction consisted of claims against the United States. Cong. Globe, 33rd Cong., 2d Sess., pp. 71, 72, 107, 108-109, 111, 113, 114.

## 2. Finality of the court's judgments.

Within a brief period after establishment of the court, it became evident that the power of Congressional revision of the court's judgments was hampering the disposition of claims. In 1861 President Lincoln recommended that Congress provide that the court's decisions be made final, saying:

"It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department; \* \* \*. It was intended by the organization

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<sup>4</sup> See p. 16, *infra*.

of the Court of Claims mainly to remove this branch of business from the Halls of Congress; \* \* \*." (Cong. Globe, Dec. 3, 1861, p. 2, Appendix; 37th Cong., 2d Sess.)

In 1863 Congress enacted a statute to make final the judgments of the court and to provide for appeals therefrom to this Court. 12 Stat. 765. However, the new law also prohibited the payment of adjudicated claims from treasury funds until an appropriation for such claims had been estimated by the Secretary of the Treasury. By reason of this provision, in effect prescribing administrative review of the court's adjudications, an appeal to this Court from a judgment of the Court of Claims was dismissed shortly afterward, for want of jurisdiction, in *Gordon v. United States*, 2 Wall. 561 (1865); opinion by Mr. Chief Justice Taney reported 117 U. S. 697 (1865).

The following year Congress repealed the objectionable provision for administrative review (Act of March 17, 1866, 14 Stat. 9), and this Court thereafter took jurisdiction of appeals from judgments of the Court of Claims. *DeGroot v. United States*, 5 Wall. 419 (1867); *United States v. Jones*, 119 U. S. 477 (1886).

It will be noted that in the *Gordon* case Chief Justice Taney stated that this Court "cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States". 117 U. S., at p. 704. It would therefore seem clear that when the judgments of the Court of Claims became final determinations, no obstacle remained to recognition of the court as one exercising judicial power under Article III.

### 3. Subsequent history concerning the court's status.

For an unbroken period of sixty years thereafter, up to 1929, this court uniformly assumed that the Court of Claims was an Article III court.

In *United States v. Klein*, 13 Wall. 128, 144-145 (1871), Chief Justice Chase stated that the "Court of Claims is thus constituted one of those inferior courts which Congress authorized \* \* \*."

In *United States v. Union Pacific R. Co.*, 98 U. S. 569, 603 (1879), the Court said:

"Congress has under this authority [Article III], created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution."

See also: *United States v. Louisiana*, 123 U. S. 32 (1887); *Minnesota v. Hitchcock*, 185 U. S. 373, 384, 386 (1902); *Kansas v. United States*, 204 U. S. 331, 342 (1907); *Miles v. Graham*, 268 U. S. 501 (1925). In the last mentioned case, the Court held that Article III, Section 1 of the Constitution forbids the imposition of a federal income tax upon the compensation of a judge of the Court of Claims.

During this sixty-year period Congress, too, in adopting the Tucker Act, Act of March 3, 1887, 24 Stat. 505,<sup>5</sup> indicated that the Court of Claims was "a judicial and not a legislative tribunal". H. Rept. 1077, 49th Cong., 1st Sess., pp. 4, 5.

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<sup>5</sup> The Act, among other things, re-enacted the jurisdiction of the Court of Claims and gave concurrent jurisdiction to the federal district courts over the same claims (up to \$10,000).

And in 1953, Congress passed the Act which states explicitly that the Court of Claims is "declared" to be—not thereby established as—an Article III court. Act of July 28, 1953, c. 253, §1, 67 Stat. 226. In short, the purpose of the Act was to confirm what the character of the court was from its beginnings, and not to change its nature from a legislative court to an Article III court.

This is evident not only from the language of the statute, but also from its legislative history. The bill which became the Act, H. R. 1070, 83rd Congress, 1st Sess., was favorably reported by the House Judiciary Committee, which stated (H. Rept. 695) :

"By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient."

The report stated further:

"It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under Article III."

We recognize that the subsequent expression of views by Congress may not be conclusive as to the earlier intent, but we submit that it merits at least "great respect". *United States v. Clafin*, 97 U. S. 546, 548 (1878).

Congress saw the necessity for the 1953 Act because of this Court's departure from the series of cases between

*DeGroot v. United States* and *Miles v. Graham*, discussed above, to state by way of dictum in *Ex parte Bakelite Corporation*, 279 U. S. 438 (1929), and to hold in *Williams v. United States*, 289 U. S. 553 (1933), that the Court of Claims is a legislative court created by Congress as an incident of its power to pay the debts of the United States (Art. I, Sec. 8, cl. 1).<sup>6</sup>

#### 4. The Williams and Bakelite cases.

In *Williams* the Court, in holding the Court of Claims to be a legislative court, confirmed the views previously expressed by it in *Bakelite*, where it had declared that although claims against the United States are susceptible of determination by courts, they nevertheless "admit of legislative or executive determination". *Ex parte Bakelite Corporation*, 279 U. S. at p. 452. We believe that this view lacks valid basis (see pp. 22-23, *infra*).

This Court further declared in *Williams* that the Court of Claims undoubtedly exercises judicial power, but not judicial power as defined by Article III. It cited in support *Gordon v. United States*, 117 U. S. 697 (1865), discussed above, and *In re Sanborn*, 148 U. S. 222 (1893), which denied an appeal to this Court from an opinion rendered to an administrative officer by the Court of Claims. We believe that *Gordon* became ineffective when the Court of Claims' judgments were made final (p. 16, *supra*), and that the effect of *Sanborn* is to prohibit the exercise of non-judicial functions by this Court. In our

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<sup>6</sup> Thomas Jefferson held the view that the words "to pay the Debts" did not carry an independent grant of power, but merely qualified the taxing power conferred by Art. I, sec. 8, cl. 1. In his Opinion on the Bank he wrote: " \* \* \* the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. They [Congress] are not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts or provide for the welfare of the Union." Writings of Thomas Jefferson, v. III, pp. 147-149 (Library Edition, 1904).

view, therefore, neither case furnishes support for the conclusion reached in *Bakelite* and *Williams* that the Court of Claims does not exercise judicial power under Article III.

Finally, the Court held in *Williams*, that Article III does not apply to controversies to which the United States is a party defendant. We believe that this conclusion is not justified either by the language or the background of the constitutional provision (see pp. 26-27, *infra*).

### 5. The court's judicial functions under Article III.

In essence, "judicial power" means the right to pronounce final determinations of actual controversies. *Musk-rat v. United States*, 219 U. S. 346, 356 (1911). This right the Court of Claims unquestionably possesses, as we have seen, subject to appellate review.

Under Article III, Section 2, the judicial power extends, *inter alia*, to:

- (1) All cases in law and equity arising under the Constitution and laws of the United States.
- (2) Controversies to which the United States shall be a party.

As we shall see, the Court of Claims exercises judicial power under both headings. First, however, we propose to review the pertinent statutory provisions governing the organization and jurisdiction of the court.

#### (a) Statutory provisions.

The Court of Claims is a court of record constituted of a chief judge and four associate judges who are appointed by the President by and with the consent of the Senate. 28 U. S. C. §171. The members of the court hold office during good behavior, and their compensation is

fixed by law. *Id.*, §173.<sup>7</sup> The judges may resign or retire from office under the same conditions as circuit judges and district judges. *Id.*, §§371, 372, 451.

The court is a "court of the United States"<sup>8</sup> within the provisions of the Judicial Code. *Id.*, §451. A judge of the court is required to take the statutory oath of office, he may not engage in the practice of law, he must disqualify himself under prescribed circumstances. *Id.*, §§453-455.

The Code provides for the appointment of a clerk, commissioners, reporter-commissioners, stenographers, clerical employees, a bailiff and a messenger. *Id.*, §§791-795.

The general jurisdiction of the Court of Claims is set forth in 28 U. S. C. §1491. Under that provision the court may render judgment upon any claim against the United States

"founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."<sup>9</sup>

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<sup>7</sup> The compensation of judges of the Court of Claims is the same as that of circuit judges, 28 U. S. C. §44(d), and exceeds that of district judges, *id.*, §135.

<sup>8</sup> The term also embraces this Court, courts of appeals, district courts, and any court created by an act of Congress, the judges of which hold office during good behavior.

<sup>9</sup> The district courts have original jurisdiction, concurrent with the Court of Claims, *inter alia*, of claims against the United States up to \$10,000 in amount,

"founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort."

28 U. S. C. §1346 (a).

The jurisdiction of the Court of Claims also includes subject matters specifically mentioned by law: accounts of officers, etc.; damages for unjust conviction, patent cases, and so on. *Id.*, §§1494-1498. Congressional reference cases are provided for in §1492. Jurisdiction is expressly withheld in pension and treaty cases. *Id.*, §§1501-1502.

The court may render judgment upon set-off or demand in favor of the United States. *Id.*, §1503. It also has appellate jurisdiction to review final judgments of the district courts, in certain cases. *Id.*, §§1504, 2110. A case mistakenly filed in the Court of Claims may be transferred to the district court, where it proceeds as if it had been filed in that court. *Id.*, §1506.

Cases from the Court of Claims are reviewable by this Court on certiorari or certified questions. *Id.*, §1255.

The procedure applicable in the Court of Claims is set forth in 28 U. S. C. §§2501-2520. Section 2519 provides:

“A final judgment of the Court of Claims against any plaintiff shall forever bar any further claim, suit or demand against the United States arising out of the matters involved in the case or controversy.”

**(b) The court's Article III judicial functions extend to claims against the United States.**

In *Bakelite* and *Williams* this Court stated that claims against the United States are susceptible of but do not necessarily or inherently require judicial determination, therefore the Court of Claims which is vested with jurisdiction over such claims does not exercise Article III judicial power. We respectfully submit that the position taken by the Court is in error.

Under the Constitution, Congress is authorized to ordain and establish inferior courts to exercise judicial power,

as that term is defined in Article III. There is no constitutional inhibition, explicit or implicit, against bringing under the jurisdiction of inferior courts for judicial determination, within the ambit of Article III, a subject matter which is also capable of being resolved in a legislative or administrative procedure. This is a matter entrusted to the will of Congress, and where Congress has acted to place the subject within the sphere of the judicial power for determination, such action is a valid exercise of its constitutional authority. As this Court said in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1856) :

" \* \* \* there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

See also, *Fong Yue Ting v. United States*, 149 U. S. 698, 715 (1893); *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U. S. 582 (1949).

Congress, therefore, is authorized to bring within the cognizance of the Court of Claims, for final determination by it, claims against the United States which comprise cases arising under the Constitution and laws of the United States and controversies to which the United States is a party, and the Court of Claims established as a forum for the determination of those claims, exercises judicial power under Article III—no less, we submit, than do the district courts in the determination of the same cases and controversies committed to their jurisdiction under 28 U. S. C. §1346 (a).

(c) The court's basic and primary judicial functions are not affected by other powers.

The fact that a part of the jurisdiction of the court involves Congressional reference cases (28 U. S. C. §1492) does not impair the primary jurisdiction of the court as above set forth, which is judicial in nature. A court may exercise Article III judicial powers and non-judicial powers. *O'Donoghue v. United States*, 289 U. S. 516 (1933). In *O'Donoghue*, the District of Columbia superior courts were held to be Article III courts, notwithstanding that they possessed non-judicial jurisdiction based on Congress' plenary power over the District under Article I, Sec. 8, cl. 17.

No reason is evident why, in principle, the same rule cannot be held to apply to the Court of Claims. The plenary power of Congress "to pay the Debts \* \* \* of the United States", conferred by Article I, would justify Congress in establishing a procedure to assist in achieving that end through the medium of the court, but that fact does not serve to destroy the fundamental nature of the judicial power otherwise exercised by the court under Article III. As was said in the *O'Donoghue* case, 289 U. S. 516, at page 546, the dual powers of Congress under Article I and Article III are not incompatible and there is "no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District".

Unlike the transitory or provisional territorial courts which are at the basis of the legislative court doctrine, the Court of Claims was established and has functioned as an integral and permanent part of the federal judicial system, possessing a specialized jurisdiction, and it is in every essential aspect a constitutional court exercising

judicial power under Article III.<sup>10</sup> Indeed, in *Pope v. United States*, 323 U. S. 1 (1944), this Court, although it did not consider what effect the non-judicial duties of the Court of Claims had on that court's constitutional status, said (at pp. 13-14):

"It is enough that, although the Court of Claims, like the courts of the District of Columbia, exercises non-judicial duties, Congress has also authorized it as an inferior court to perform judicial functions whose exercise is reviewable here. The problem presented here is no different than if Congress had given a like direction to any district court to be followed as in other Tucker Act cases."

**(d) The court performs judicial functions in cases arising under the Constitution and laws of the United States.**

The matters entrusted to the general jurisdiction of the Court of Claims include claims against the United States arising under the Constitution and laws of the United States. 28 U. S. C. §1491, p. 21, *supra*. Such claims have a federal origin; their subject matter is essentially federal in nature; they must be authorized by federal act; they are pursued in federal courts. Those claims require a determination of federal questions under the Constitution or acts of Congress and are, we submit, cases arising under the Constitution and laws of the United States within the judicial power defined in Article

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<sup>10</sup> Other courts of specialized jurisdiction were the Emergency Court of Appeals created by the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 31-33, with jurisdiction to review orders of the Price Administrator, and composed of circuit judges and district judges designated by the Chief Justice, and the Commerce Court created by the Mann-Elkins Act of 1910, 36 Stat. 539, with jurisdiction to review orders of the Interstate Commerce Commission, and composed of circuit judges to be designated by the Chief Justice. The Commerce Court was abolished by the Act of October 22, 1913, 38 Stat. 208, 219.

III. See *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U. S. 582 at 611-615, 641-642, 643, 649 (1949); *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 455 (1899).

(e) **The court performs judicial functions in controversies to which the United States is a party.**

Since the United States is a party to all controversies in the Court of Claims, the judicial power under Article III would normally be thought to extend to the determination of those controversies. Indeed, this Court in the past had expressly so declared. *Minnesota v. Hitchcock*, 185 U. S. 373, 384, 386 (1902); *Kansas v. United States*, 204 U. S. 331, 342 (1907). In *Williams*, however, the Court rejected its views so expressed, and stated that the provision of Article III in question was actually meant to refer only to controversies to which the United States is a party plaintiff, for the sovereign is immune from suit. *Williams v. United States*, 289 U. S. 553, 572-579 (1933).

We submit, however, that the practice of waiver of sovereign immunity and consent to be sued had evolved long before the framing of the Constitution and the existence of the practice was well-known to the framers. The Federalist, No. 81 (Hamilton); *Monaco v. Mississippi*, 292 U. S. 313, 323-324 (1934). Thus, the extension of judicial power under Article III to controversies to which the United States is a "party" would seem rather to manifest an intention that such power shall apply not only to matters in which the United States is party plaintiff, but also to controversies where it is party defendant by reason of having waived immunity, as was stated by the Court in *Minnesota v. Hitchcock*, *supra*, and *Kansas v. United States*, *supra*.

The reliance of *Williams* upon the omission from this clause of the word "all" which is mentioned in some

other categories of cases to which the judicial power extends is not, in our view, conclusive of intent. It was pointed out in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 334-335, 336 (1816), that the omission of the word indicated that the judicial power was not to be extended "imperatively" to cases where it would be better for the power to be exercised only as Congress "in their wisdom" might determine, and left it open to Congress "to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate".

Moreover, the fact that the Judiciary Act of 1789 conferred jurisdiction on the circuit courts in cases where the United States is plaintiff is not persuasive as to the scope of Article III. This is indicated by the Act itself, in the fact that jurisdiction was not conferred where the matter in dispute amounted to \$500 or less, although of course, Article III does not contain such a limitation. It cannot be assumed, therefore, that the Act precisely reflected the types of cases and controversies to which the judicial power under Article III extends.

The language of the provision extending the judicial power to controversies to which the United States is a party is unconditional, and examination of its background fails to demonstrate that its scope is in any respect limited so as to exclude controversies to which the United States is a party defendant.

**6. Since the 1953 Act, the court's status as an Article III court has been unquestionable.**

Article III provides that Congress may, from time to time, ordain and establish inferior courts to exercise the judicial power defined in that Article. By the 1953 Act, Congress, among other things, amended 28 U. S. C. §171 so as to add the following provision:

"Such court [*i. e.*, the Court of Claims] is hereby declared to be a court established under article III of the Constitution of the United States."

The report of the House Judiciary Committee recommending passage of H. R. 1070, which became the Act, is explicit in setting forth the purposes of the bill. H. Rept. 695, 83d Congress, 1st Sess. The report declares:

"The principal purpose of this bill is to declare the United States Court of Claims to be a court established under article III of the Constitution. Subsequent to a long line of decisions which recognized the Court of Claims as such a constitutional court, the United States Supreme Court held in 1933 that the Court of Claims was not organized under the provisions of article III, but rather was created by Congress as a so-called legislative court in the exercise of its constitutional power under article I to pay the debts of the United States. By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient."

The report states further:

"Congress was possessed of two powers under which it might have created the Court of Claims, and it would seem appropriate for it to say which of the powers it was intending to exercise. \* \* \*"

"It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under Article III."

After reviewing the cases which dealt with the status of the Court of Claims, the report continues:

"In view of this uncertainty and difference of opinion it would certainly seem proper for the body which created the Court of Claims to declare whether, in the creation of it, Congress intended to exercise article I or article III power."

We are aware that *Ex parte Bakelite Corporation*, 279 U. S. 438, 459 (1929), indicates that the constitutional status of a court does not depend on the intention of Congress, but "the true test lies in the power under which the court was created and in the jurisdiction conferred."

We respectfully suggest, however, that if this is indeed the applicable test, some investigation into the intent of Congress in establishing a court is not without relevance. When Congress acts, *i.e.*, exercises a power, assuredly its purpose or intent merits inquiry. In the consideration of the bill which became the 1953 Act, Congress knew that a question existed as to whether it had exercised Article I or Article III power in the creation of the Court of Claims, and it declared its purpose that the court was ordained and established as an Article III court. We submit that the express statutory declaration was effectual to fix the status of the court from its beginnings, and, at the least, from the time of the Act. If a declaratory act is inoperative on the past, it may nevertheless act on the future. *Postmaster-General v. Early*, 12 Wheat. 136, 148-149 (1827).

The status of the Court of Claims as an Article III court has been settled, therefore, at least since 1953, and

the court possessed that status when Judge Madden participated in the hearing and determination of this case. Judge Madden's status at that time was that of a judge of an Article III court. Although he took office in 1941, it will be noted that in conformity with the provisions of Article III he was appointed by the President by and with the advice and consent of the Senate, and that at all times during his continuance in office he enjoyed life tenure. The 1953 Act did not abolish his office or create a new one. There was no necessity that he should again be nominated and appointed. *Shoemaker v. United States*, 147 U. S. 282, 301 (1893).

## CONCLUSION

**For the foregoing reasons, the judgment of the court below should be affirmed.**

December 26, 1961.

Respectfully submitted,

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THE GIDDEN COMPANY, ETC.



APPEAL BRIEF TO THE UNITED STATES

APRIL 10, 1941

No. 242

THE GIDDEN COMPANY, ETC.,

Petitioner,

OLGA ZDANOK, ET AL.,

Respondents.

MOTION OF COUNSELOR TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FOR LEAVES TO FILE CERTIFICATE OF THE  
UNITED STATES COURT OF APPEALS AND TO AMEND  
THE PETITIONER'S BRIEF IN THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT  
AS A BRIEF COUNTER

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1961

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No. 242

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THE GLIDDEN COMPANY, ETC.,

v. *Petitioner,*

OLGA ZDANOK, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**BRIEF FOR MARVIN JONES, CHIEF JUDGE OF THE UNITED STATES COURT OF CLAIMS, AND SAMUEL E. WHITAKER, DON N. LARAMORE, JAMES R. DURFEE, BENJAMIN H. LITTLETON AND J. WARREN MADDEN, JUDGES OF THE UNITED STATES COURT OF CLAIMS, AS AMICI CURIAE**

The parties have consented in writing to the filing of this brief pursuant to Rule 42.

**Interest of Amici Curiae**

The question before this Court for review under the limited grant of certiorari is whether the participation by Judge Madden of the Court of Claims in the hearing and decision of the Court of Appeals for the Second Circuit

vitiates the judgment entered by that Court. While the Judges of the Court of Claims have no concern with the outcome of the case as such, the question thus presented raises a number of issues which directly and importantly affect the Court of Claims and its member judges.

Petitioner would have this Court declare unconstitutional the statute, 28 U.S.C. § 293(a), authorizing judges of the Court of Claims "to perform judicial duties in any circuit, either in a court of appeals or district court," pursuant to designation and assignment by the Chief Justice. Any such ruling, while not necessarily controlling, could also cast doubt upon the validity of the statutes, 28 U.S.C. §§291(b), 292(d), authorizing the Chief Justice to assign circuit and district judges for temporary service on the Court of Claims. The system established by the Congress for assigning judges for temporary service on other courts has, we believe, materially improved the machinery for the administration of justice in the federal courts. Certainly, the assigned services of judges of other courts have greatly assisted the Court of Claims from time to time in its operations. Petitioner's constitutional attack on an important aspect of the assignment system consequently is a matter of substantial concern to the Court of Claims.

Petitioner also contends, as a necessary premise to its argument with respect to the assignment statute, that a 1953 statute (67 Stat. 226, 28 U.S.C. §171) in which the Congress declared the Court of Claims to be "a court established under article III of the Constitution of the United States," is unconstitutional, and that the Court of Claims is a "legislative court" established under Article I of the Constitution. The status of the Court of Claims as a constitutional or a legislative court is thus in issue, and the resolution of that issue by this Court in effect will

determine whether the judges of the Court of Claims are protected by Article III with respect to their tenure and compensation.

Some of the issues raised by this case, therefore, are of substantial importance to the status and operation of the Court of Claims and its member judges. For that reason and because of a belief that the views expressed herein may aid this Court in its consideration and decision of those issues, the Judges of the Court of Claims have obtained the consent of the parties to appear as *amici curiae*.

### **Summary of Argument**

The Court of Claims was created in 1855 and was authorized to enter final judgment on certain claims against the United States in 1866. For many years thereafter, the Court was generally considered to be a constitutional court created under Article III of the Constitution. A *dictum* in *Ex Parte Bakelite Corp'n.*, 279 U.S. 438 (1929), however, expressed the view that the Court of Claims was a so-called "legislative court" created pursuant to the Article I power of the Congress to pay the debts of the United States, and *Williams v. United States*, 289 U.S. 553 (1933), so held. We believe that *Williams* erred in holding the Court of Claims to be a legislative court and should now be overruled. After thorough consideration, the Congress concluded, in 1953, that the Court of Claims had initially been created as a constitutional court and enacted a statute declaring the Court of Claims "to be a court established under article III of the Constitution of the United States." 67 Stat. 226, 28 U.S.C. § 171. This conclusion by the Congress, we believe, provides justification for reconsideration of *Williams*, and the statutory declaration enacted by the Congress establishes that the Court of Claims has been a constitutional

court since 1953 even if *Williams* is reaffirmed insofar as it held that the Court of Claims was initially created as a legislative court.

## I

A. Article III vests the "judicial Power of the United States" in this Supreme Court and in such inferior courts as the Congress may establish pursuant to Article III. Article III also extends this judicial power to specified cases or controversies, and provides that the judges of courts created by or under Article III—so-called "constitutional courts"—shall hold their offices during good behavior and shall receive a compensation which shall not be diminished during their continuance in office. The purpose of these provisions concerning tenure and compensation was to protect the independence of the judiciary from coercive influences of the legislative and executive branches. *O'Donoghue v. United States*, 289 U.S. 516, 529-534 (1933). This purpose is particularly applicable to the Court of Claims because of its location at the seat of Government and the nature of its jurisdiction, so that only the most compelling reasons should justify depriving the Court of Claims of the protections of Article III with respect to tenure and compensation.

The language and history of the Constitution, and the separation of powers doctrine fundamental to that document, all indicate that Article III was intended to be the exclusive source of judicial power which power was to be exercised only by Article III courts. *American Insurance Co. v. Canter*, I Peters 511 (1828), held, however, that the territorial courts were created and exercise judicial power pursuant to the plenary authority of the Congress under Article I over the territories of the United States. The legislative-court concept thus introduced has become deeply embedded and we do not contend that it should now be rejected entirely. We do contend that it should be limited

in essence to the territorial courts which gave rise to the concept and to which it was confined until the *Bakelite* case was decided in 1929.

B. *Canter* involved the courts of the Territory of Florida, the judges of which had been limited to four-year terms. A holding that Article III applied to such courts would either destroy the judicial system of the Territory or else virtually nullify the tenure provision of Article III, depending upon whether the limited tenure of the Florida judges was upheld. Chief Justice Marshall, in *Canter*, sought to escape this dilemma by the legislative-court concept, explaining that the Florida courts were "incapable of receiving" Article III judicial power because of the limited tenure of the judges and thus must have been created under Article I. This explanation opened the possibility, however, that Article III's requirement of life tenure could be avoided in other situations merely by denying such tenure, and was soon abandoned.

When Florida was admitted to the Union, the status of its courts was again considered, and it was held that the judicial power could only be exercised by courts created pursuant to Article III and staffed by judges possessing the life tenure required by the Article. *Benner v. Porter*, 9 How. 235, 243-244 (1850). That case also suggested that *Canter* could be explained on the ground that the Constitution is inapplicable outside the boundaries of the United States proper, and this explanation was adopted in *Downes v. Bidwell*, 182 U.S. 244, 263-267 (1901). Other cases sought to explain *Canter* as being due to the temporary nature of territorial courts which were superseded when the particular territory was admitted to the union. *McAllister v. United States*, 141 U.S. 174, 187-188 (1891). While these cases adhered to the *Canter* decision and held that the courts of the territories and similar courts, such as the consular

courts, situated outside the boundaries of the United States proper are legislative courts, no case prior to *Bakelite* applied that concept to courts within the United States.

In accordance with this restriction of the legislative-court concept, the Court of Claims was categorized as a constitutional court, *United States v. Union Pacific R. Co.*, 98 U.S. 569, 603 (1878), final judgments of the Court of Claims were reviewed by this Court, *United States v. Klein*, 13 Wall. 128, 144-145 (1871), and the judges of the Court of Claims were held to be protected against diminution of their compensation, *Miles v. Graham*, 268 U.S. 501 (1925). The Tucker Act, in 1877, reenacted the basic jurisdiction of the Court of Claims and conferred concurrent jurisdiction upon the federal district courts during this period when the status of the Court of Claims as a constitutional court seemed to be settled and in apparent acceptance of that status..

The *Bakelite* case, decided in 1929, held the Court of Customs Appeals to be a legislative court in an opinion which endeavored to fashion a general theory of legislative courts encompassing the Court of Customs Appeals, the territorial courts, and a number of other courts, including the Court of Claims and the District of Columbia courts, which were classified in *dicta* as legislative courts. *Bakelite* stated that "the true test lies in the power under which the court was created and in the jurisdiction conferred," and rejected an argument based on the life tenure of the judges of the Court of Customs Appeals as mistakenly assuming "that whether a court is of one class or the other depends on the intention of Congress." 279 U.S., at p. 459. This "true test" is largely circular, however, in that the basic issue is the power (Article I or Article III) under which the particular court was created, and does not really explain the territorial-court cases as such courts, including the Florida courts involved in *Canter*, generally were conferred federal-question jurisdiction virtually in the language of

Article III. Furthermore, this sudden expansion of the legislative-court concept seriously undermined the purpose of Article III to protect the independence of the federal judiciary.

*O'Donoghue v. United States*, 289 U.S. 516 (1933), held the District of Columbia courts to be constitutional courts, rejecting the contrary *dictum* in *Bakelite*. The purpose of Article III to protect the independence of the judiciary was stressed and the territorial-court cases once again were placed in a special category for which the temporary nature of territorial governments provided some justification. Otherwise, the determination of whether a court was created under Article III depends upon whether "the judicial power conferred extend[s] to the cases enumerated in that article." *Id.*, at p. 546. The fact that the Congress may have conferred non-Article III jurisdiction on a court does not affect its status as a constitutional court. Thus, the District of Columbia courts were found to be constitutional courts because they exercised jurisdiction over cases and controversies coming with the scope of Article III and despite the fact that they also had certain administrative and quasi-judicial advisory functions. Furthermore, the life tenure of the judges of the District of Columbia courts and other indications that the Congress intended to create such courts under Article III were considered to be significant factors.

The *Williams* case was decided on the same day as *O'Donoghue* and the opinions in both cases were written by Mr. Justice Sutherland. In holding the Court of Claims to be a legislative court, *Williams* relied heavily upon the *dictum* to that effect in *Bakelite*, but also held that the Court of Claims does not exercise jurisdiction over cases or controversies coming within the categories enumerated in Article III. *Bakelite* was quoted for the proposition that the advisory jurisdiction exercised by the Court of Claims in some instances demonstrated that it had been treated by

the Congress as a legislative court. These conclusions, necessary to harmonize the *Williams* decision with the criteria expressed in the *O'Donoghue* opinion rendered the same day, were, we believe, erroneous.

In *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582 (1949), four opinions were written, none of which gained the adherence of a majority of the Court. Some aspects of the legislative court-constitutional court controversy were discussed in all four opinions, and three of the opinions representing six members of this Court indicated disagreement with the holding in *Williams* that the Court of Claims does not exercise Article III jurisdiction.

C. Accepting the fact that the legislative-court doctrine is too firmly entrenched to be uprooted altogether, we believe that the *O'Donoghue* approach provides an appropriate accommodation with the purpose of Article III to protect the independence of the judiciary. With the exception of the territorial and similar courts situated outside the boundaries of the United States proper which may be said to be "incapable of receiving" Article III judicial power because of their presumably temporary nature, any federal court granted jurisdiction over cases or controversies of a kind enumerated in Article III is an Article III court and its

members are judges entitled to the protections provided in Article III with respect to tenure and compensation. This protection is not lost merely because the Congress may also have conferred non-judicial functions on the court under Article I, and the intention of the Congress may be persuasive if there is any doubt as to the Article III jurisdiction and nature of a particular court. While *Williams* appears to have accepted the approach enunciated in *O'Donoghue*, it erred in concluding that the Court of Claims does not exercise any Article III jurisdiction and has been treated by the Congress as a legislative court.

D. Article III extends the judicial power of the United States to, among other things, "Controversies to which the United States shall be a Party." Although the United States is a party to all litigation in the Court of Claims, *Williams* held that such litigation does not come within Article III because the above-quoted provision is to be construed as applying only to cases in which the United States is a party *plaintiff*. This construction is contrary to the plain meaning of the term "party," and no support was cited or has been found in the debates at the Constitutional Convention. *Chisholm v. Georgia*, 2 Dall. 419 (1793), which was participated in by several members of the Constitutional Convention, held that "party" as used in the provision of Article III giving this Court original jurisdiction over cases "in which a State shall be a Party" included cases in which a state is a defendant as well as those in which it is a plaintiff. This Court has continued to hold that it has original jurisdiction over actions brought against a state as a defendant with respect to those cases and controversies over which the judicial power extends. *United States v. Texas*, 143 U.S. 621, 643-644 (1892).

*Minnesota v. Hitchcock*, 185 U.S. 373, 383 (1902), held that Article III judicial power over controversies to which the United States is a party included cases to which the United States is a defendant when it consents to be sued, as in the Court of Claims. In overruling this decision and rewriting the plain language of Article III, *Williams* asserted that the framers of the Constitution did not contemplate the possibility that the United States might be a party defendant because of its sovereign immunity from suit. *Hans v. Louisiana*, 134 U.S. 1 (1890), which expressed approval of the dissenting opinion of Mr. Justice Iredell in *Chisholm v. Georgia*, was relied upon to support this proposition. Both the *Hans* opinion and the Iredell dissent,

however, recognized that sovereign immunity could be waived and that a sovereign could be sued in the federal courts with its consent. Moreover, the concept of waiver of sovereign immunity was well known when the Constitution was adopted. See *Monaco v. Mississippi*, 292 U.S. 313, 323-324 (1934).

In any event, *Williams* failed to consider the possibility that the Court of Claims exercises Article III judicial power under the provision extending that power to cases arising under the Constitution and laws of the United States. Under the Tucker Act, the Court of Claims and the federal district courts exercise concurrent jurisdiction over claims founded upon the Constitution, Acts of Congress, federal regulations or contracts authorized by statute. All of this jurisdiction would appear to be Article III federal-question jurisdiction, and six Justices of this Court so indicated in the *Tidewater* case. Also, since a statutory waiver of sovereign immunity is essential to a suit against the United States, claims brought in the Court of Claims necessarily must involve a question arising under the laws of the United States. We believe, therefore, that *Williams* erred in holding that the Court of Claims does not exercise Article III judicial power.

E. The Court of Claims was constituted in substantially its present form during the eleven-year period between 1855 and 1866. The judges of the Court of Claims were given life tenure during good behavior, and the legislative history of the pertinent statutes demonstrates beyond reasonable doubt that the Congress intended to create the Court of Claims under Article III as an inferior court for the exercise of Article III judicial power. This legislative history, which was not referred to in the *Williams* opinion, shows that *Williams* also erred in concluding that

the Congress has treated the Court of Claims as a legislative court.

## II

The 1953 statute, which declares the Court of Claims "to be a court established under article III of the Constitution of the United States," validly establishes the present status of the Court of Claims as a constitutional court even if *Williams* is reaffirmed in holding that the Court of Claims initially was created as a legislative court. *Williams* conceded that this holding could be reconciled with the concurrent Tucker Act jurisdiction of the federal district courts and with the review by this Court of judgments of the Court of Claims, only by the concept adopted in *Williams* that the Court of Claims exercises "judicial power" which can be conferred upon Article III courts as well as upon Article I courts even though such "judicial power" is conferred under Article I. While this concept of "judicial power" apart from that provided in Article III seems to us to be inconsistent with the language of the Constitution and the purpose of Article III to assure an independent judiciary, the concept was vital to the *Williams* decision and, we believe, must be accepted if that decision is reaffirmed. Assuming, therefore, that the Congress under Article I can confer judicial power over claims against the United States upon either Article I courts or Article III courts, we see no reason why the Congress should not be free to declare that the Court of Claims henceforth shall exercise such judicial power as an Article III court.

While the Congress in the 1953 Act was expressing its view that the Court of Claims has always been a constitutional court, this was done in the form of a declaration entitled to future effect even if the Congress was mistaken about the past status of the Court of Claims. *Postmaster-*

*General v. Early*, 12 Wheat. 136, 148-149 (1827). Such a change in the status of the Court does not, we believe, necessitate reappointment of its judges. Cf., *Shoemaker v. United States*, 147 U.S. 282, 301 (1893). They already had life tenure, and they were appointed by the President and confirmed by the Senate as required by the Constitution. The surrender of any right that the Congress may have had to reduce their compensation hardly suffices in itself to require reappointment. Moreover, the status of the Court of Claims poses no serious threat, in our opinion, to its limited advisory functions in congressional reference cases, in view of the holding in *O'Donoghue* that the District of Columbia courts may exercise jurisdiction of a similar nature. In any event, it would seem that such functions could be performed voluntarily, even if they could not be required, and the Congress enacted the 1953 Act even though advised that the congressional reference jurisdiction of the Court of Claims might be affected by the Act.

### Argument

The status of the Court of Claims as a constitutional court established under Article III of the Constitution seemed to be settled until *Ex Parte Bakelite Corp'n.*, 279 U.S. 438, 452-455 (1929), expressed the view that the Court of Claims was a legislative court while holding that the Court of Customs Appeals (now the Court of Customs and Patent Appeals) was a legislative court. This *dictum* in *Bakelite* with respect to the status of the Court of Claims was converted into a holding by *Williams v. United States*, 289 U.S. 553 (1933). *Bakelite* and *Williams* provide the basis for petitioner's contention that Judge Madden's participation in the hearing and decision below was unconstitutional, even though his assignment by the Chief Justice

to serve temporarily on the Court of Appeals for the Second Circuit was authorized by statute.

With all deference, but with the frankness which the subject demands, we suggest that the *dictum* of this Court in *Bakelite* and its holding in *Williams* were seriously in error and should be reexamined. We are encouraged in this suggestion by the fact that the status of the Court of Customs and Patent Appeals—the subject of the holding in *Bakelite*—is also before this Court at the present time in *Lurk v. United States*, No. 481, cert. granted, 368 U.S. 815 (1961). We are further encouraged in this suggestion by the fact that the Congress, after thorough consideration, has concluded that *Bakelite* and *Williams* were wrongly decided, and has expressed that conclusion in legislation.

In 1953, the Congress enacted a statute (67 Stat. 226, 28 U.S.C. § 171) in which the Court of Claims was “declared to be a court established under article III of the Constitution of the United States.” A similar statute (72 Stat. 848, 28 U.S.C. § 211) was enacted in 1958 with respect to the Court of Customs and Patent Appeals.<sup>1</sup> The language of these acts indicates a congressional belief that the existing status of the courts in question was being declared, rather than a changed status, and this is confirmed by the legislative history of the 1953 Act. H. Rept. No. 695, 83d Cong., 1st Sess., states, at p. 2, that:

“The principal purpose of this bill is to declare the United States Court of Claims to be a court established under article III of the Constitution. Subsequent to a long line of decisions which recognized the Court of Claims as such a constitutional court,

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<sup>1</sup>A similar statute (70 Stat. 532, 28 U.S.C. § 251) was also enacted, in 1956, with respect to the Customs Court, which another *dictum* in *Bakelite* (279 U.S., at pp. 457-458) had characterized as a legislative court.

the United States Supreme Court held in 1933 that the Court of Claims was not organized under the provisions of article III, but rather was created by Congress as a so-called legislative court in the exercise of its constitutional power under article I to pay the debts of the United States. By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient . . . ”

See, also, S. Rept. No. 275, 83d Cong., 1st Sess., p. 2.<sup>2</sup>

The House Report, at pp. 3-5, contains a detailed discussion of many of the pertinent decisions, including *Bakelite* and *Williams*, and refers to the legislative history of the statute initially creating the Court of Claims as “indicating that Congress intended to create a court under the power granted to it by article III to create inferior courts.”

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<sup>2</sup> S. Rept. No. 275 was a “corrected report” substituted (99 Cong. Rec. 5020) for S. Rept. No. 261, 83d Cong., 1st Sess., which originally accompanied the bill reported to the Senate. Language in the earlier report (at p. 2) stating that the Committee was of the opinion that the Court of Claims “more properly should have been so created” under Article III, was replaced in the corrected report by a statement that the Committee was of the opinion “that Congress intended it to have been so created” under Article III. When the Senate bill came up for debate on the floor of the Senate, the House bill was substituted for it at the request of Senator Gore, who explained that the House bill made entirely clear that the Congress did “not intend to create a new court” by “simply declaring that the existing Court of Claims should be a court established under article III of the Constitution. . . .” 99 Cong. Rec. 8943.

We demonstrate, in Part II of this Argument, that the declaration by the Congress in the 1953 Act is determinative of the present status of the Court of Claims, even if this Court should reaffirm *Williams* and hold that prior to that Act the Court of Claims was a legislative court. But we also believe that the 1953 Act, and the considered judgment of the Congress expressed therein that the Court of Claims has always been a constitutional court, justifies a reconsideration by this Court of its holding in *Williams*. Cf., *United States v. Hutcheson*, 312 U.S. 219, 235-237 (1941).<sup>3</sup> In Part I of this Argument, we show that such a reconsideration should lead this Court to overrule *Williams* and confine the legislative-court doctrine to its proper sphere.

## I

### **The Williams Decision Erred in Holding that the Court of Claims Was Created as A Legislative Court**

The *Bakelite* and *Williams* decisions are not an integral part of a settled doctrine of constitutional law the overruling of which might have far reaching effects. Rather, those decisions suddenly expanded a narrow, judicially-created exception to Article III of the Constitution—an exception for many years limited to territorial courts and which even as so limited rested on reasoning that is dubious at best. The “contradictions, complexities and subtleties” found by Mr. Justice Rutledge “in the maze woven by

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<sup>3</sup> While an expression by a later Congress of its views is “not conclusive” insofar as the intent of an earlier Congress in enacting a statute is concerned, such an expression is “entitled to great respect” from the courts in determining that intent. *United States v. Clafin*, 97 U.S. 546, 548 (1878); see, e.g., *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 310-313 (1954); *N.Y. & Norfolk R.R. v. Peninsula Exchange*, 240 U.S. 34, 39 (1916).

the 'legislative court—constitutional court' controversy"<sup>4</sup> were largely engendered by *Bakelite* and subsequent decisions, including *Williams*, which sought to deal with the extensive *dicta* in the *Bakelite* opinion. In all of this controversy, the important purposes intended to be served by Article III, and particularly the safeguarding of the independence of the federal judiciary, seem to us to have been needlessly slighted. *Williams* ignored the plainly expressed intent of the Congress to create the Court of Claims as a constitutional court under Article III—an intent which would seem to be decisive if the Congress had an option between a legislative and a constitutional court. Thus, we show below that, for these and other reasons, *Williams* is unsound and should be overruled.

A. *The Provisions and Purposes of Article III.* In accordance with the separation of powers doctrine basic to our Constitution, that document separately provides for the "legislative Powers" (Article I), for the "executive Power" (Article II), and for the "judicial Power" (Article III) of the United States. Section 1 of Article III provides that:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

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<sup>4</sup> *Nat. Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 604-605 (1949) (concurring opinion).

Section 2 of Article III provides that the "judicial Power" shall extend to specified cases and controversies, including cases arising under the Constitution and laws of the United States and controversies to which the United States shall be a party. Section 2 also provides for limited original jurisdiction in this Supreme Court and that in "all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Article III in addition contains provisions respecting the right to jury trials and defining the crime of treason against the United States.

The purpose of conferring life tenure upon federal judges during good behavior and of prohibiting any diminution of their compensation, undoubtedly was to safeguard the independence of the judiciary—to assure that federal judges shall be "independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933), and see, generally, pp. 529-534; *Evans v. Gore*, 253 U.S. 245, 248-254 (1920). The importance attributed to this purpose is indicated by "the following strong and frequently quoted language" of Chief Justice Marshall, in the course of the debates of the Virginia State Convention of 1829-1830, as quoted in *O'Donoghue v. United States*, *supra* at p. 532:

"The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered per-

factly and completely independent, with nothing to influence or control him but God and his conscience! . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

*O'Donoghue* pointed out that the reasons which impelled the adoption of the limitations in Article III concerning the tenure and compensation of federal judges "apply with even greater force to the courts of the District [of Columbia] than to the inferior courts of the United States located elsewhere, because the judges of the former courts are in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting operations of the general government and its various departments." *Id.*, at p. 535. The Court of Claims, of course, is also located in the District of Columbia, and is exclusively concerned with claims to which the United States is a party and arising out of the "operations of the general government and its various departments." Since the Court of Claims comes so clearly within the intent and purposes of Article III, seemingly only the most persuasive reasons would be sufficient to justify a finding that Article III is inapplicable to that Court and to the judges thereof.

Indeed, *Williams* recognized that the Court of Claims closely resembles the District of Columbia courts in this respect. "It is a court of great importance, dealing with claims against the United States, which, in the aggregate, amount to a vast sum each year. The questions which it considers call for the exercise of a high order of intelligence, learning and ability. The preservation of its independence is a matter of public concern. The sole function

of the court being to decide between the government and private suitors, a condition, on the part of the judges, of entire dependence upon the legislative pleasure for the tenure of their offices and for a continuance of adequate compensation during their service in office, to say the least, is not desirable." 289 U.S., at pp. 561-562. Where Williams erred, as we attempt to show later in this brief, was not in recognizing the desirability of affording the protections of Article III to the Court of Claims and its judges, but in the reasons given for withholding that protection.

There is nothing in the language of Article III, or elsewhere in the Constitution, to indicate that the Congress was intended to have the power to establish so-called legislative courts for the exercise of judicial power unrestricted by the limitations of Article III. The more natural implication, we believe, is that the framers of the Constitution intended Article III to be the exclusive source of judicial power, with the judicial system being limited to courts established under and exercising jurisdiction within the limits prescribed by that Article. This implication is reinforced by the fact that Article III represented a careful compromise of conflicting views, after considerable debate over the desirability of creating a federal judicial system and over the scope of the judicial power to be entrusted to the federal courts.<sup>5</sup> It is difficult to believe that the framers contemplated or intended to permit a facile avoidance of the limitations of Article III through the device of legislative courts created under Article I. Insofar as we have been able to discover, the possibility of such legislative courts was never suggested during the debates in

<sup>5</sup> See the concurring opinion of Mr. Justice Rutledge and the dissenting opinions of Chief Justice Vinson and Mr. Justice Frankfurter in *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 615-617, 627-634, 647-654 (1949).

the Constitutional Convention or over ratification of the Constitution by the States.

The legislative-court concept was early enunciated, nevertheless, in an opinion by Chief Justice Marshall for an unanimous Court in *American Insurance Co. v. Canter*, 1 Peters 511 (1828), and we do not contend that the concept should be or need be entirely eradicated at this late date. But cf., *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). We do contend that the legislative-court exception to Article III should be confined to the territorial and other courts without the boundaries of the United States proper, such as were involved in *Canter* and in all applications of the legislative-court doctrine prior to *Bakelite*.

B. *Development of the Concept of Legislative Courts.* In *American Insurance Co. v. Canter*, *supra*, the Insurance Company had brought an action against Canter to recover 356 bales of cotton purchased by Canter at a salvage sale pursuant to a decree of a court of the then Territory of Florida. The Insurance Company contended, among other things, that the Congress could not vest admiralty jurisdiction in courts created by the Florida territorial legislature because Article III vested the whole of the judicial power, including cases of admiralty and maritime jurisdiction, "in one supreme court, and in such inferior courts as congress shall from time to time ordain and establish." 1 Peters, at p. 546. Replying to this argument, Chief Justice Marshall stated (*ibid.*) that:

"We have only to pursue this subject one step further, to perceive that this provision of the constitution does not apply to it. The next sentence [of Article III] declares, that 'the judges of both of the supreme and inferior court [sic], shall hold their office during good

behavior.' The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government."

Chief Justice Marshall's reasons, as stated in *Canter*, for holding the Florida territorial courts to be legislative courts are plainly inapplicable to the Court of Claims. The Florida courts were said to be "incapable of receiving" Article III judicial power because the judges of those courts were appointed for a limited term, while the judges of the Court of Claims "hold office during good behavior." 28 U.S.C. § 173. And the determination and payment of claims against the United States involves an exercise of the powers of the general federal government as such

rather than "the combined powers of the general, and of a state government." Moreover, there were practical reasons for the *Canter* decision which are inapplicable here. Professor Moore has pointed out that this Court was faced in *Canter* with the problem of avoiding destruction of the judicial system in the Territory of Florida despite the limited tenure of the judges of the Florida courts, and at the same time avoiding impairment of Article III's guarantee of life tenure during good behavior, insofar as that could be done. 1 Moore, Federal Practice, pp. 57-58 (2d ed.). In addition, as Webster argued to this Court in *Canter*, it would "be a hard case against the claimant of the property [Canter], should he lose it, having purchased it in good faith under the decree of a court exercising jurisdiction over the matter, and to which jurisdiction, no objection was made by the parties to the proceeding." 1 Peters, at p. 537.

Whether or not *Canter* was a hard case which made bad law, that decision posed a threat to the continued vitality of Article III, insofar as it was grounded upon the view that the Florida courts were "incapable of receiving" Article III judicial power because of the limited tenure of the judges of those courts and, therefore, must have been created pursuant to some other power of the Congress. If non-compliance with Article III, at least insofar as tenure was concerned, served to establish the inapplicability of Article III, the safeguards in that Article of an independent judiciary could easily be avoided if the Congress was so minded.

The unsatisfactory nature of this rationale for the legislative-court doctrine was soon recognized, and efforts were made to limit the scope of the doctrine and to suggest other explanations for it. Thus, in *Benner v. Porter*,<sup>9</sup>

How. 235, 243-244 (1850), where an issue arose concerning the status of the Florida courts after admission of that State to the Union, this Court stated that:

"The admission of the State into the Union brought the Territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument. By art. 3, § 1, 'The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour.'

"Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but the judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution. The Territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. (1 Pet., 546.) Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body was incapable of conferring upon the courts within the limits of a State."

*Benner v. Porter*, therefore, suggested that the territorial courts were not subject to the Constitution at all, while firmly disclaiming the possibility that the legislative-court doctrine might be extended to courts created by the Con-

gress within a State of the Union. This suggestion was elaborated in *Downes v. Bidwell*, 182 U.S. 244, 263-267 (1901), where the majority stressed that the territories were not considered to be part of the United States and for that reason were beyond the reach of the Constitution and Article III thereof.<sup>6</sup> In so doing, they pointed to the difficulties which would arise if *Canter* were placed on any other basis, as follows (*id.*, at p. 267) :

“But if they be a part of the United States, it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution. The power to make needful rules and regulations would certainly not authorize anything inconsistent with the Constitution if it applied to the territories. Certainly no such court could be created within a State, except under the restrictions of the judicial clause. It is sufficient to say that this case [*Canter*] has ever since been accepted as authority for the proposition that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it.”

The view that the Constitution is inapplicable outside the territorial limits of the United States proper was also advanced to uphold the validity of consular courts which failed to comply with various constitutional guarantees. *In re Ross*, 140 U.S. 453 (1891).

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<sup>6</sup> “As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution.” 182 U.S., at p. 266.

A concurring opinion in *Downes v. Bidwell, supra*, at p. 293, expressed the view that *Canter* and similar decisions with respect to the legislative nature of territorial courts grew out of "the presumably ephemeral nature of a territorial government. . . ." This view had earlier been advanced in *McAllister v. United States*, 141 U.S. 174, 187-188 (1891), where this Court held that judges of territorial courts were not entitled by Article III to life tenure and stated that the "absence from the Constitution of such guarantees for territorial judges was no doubt due to the fact that the organization of governments for the Territories was but temporary, and would be superseded when the Territories became States of the Union."

Thus, while this Court adhered to the holding in *Canter* that the territorial courts are legislative courts rather than constitutional courts created under Article III, the rationale for that holding was shifted and the holding in effect was limited to the territorial courts and similar courts (such as the consular courts) situated without the geographic boundaries of the United States proper. Prior to *Bakelite*, decided in 1929, no case had held that a federal court situated within the United States proper was a legislative court not subject to the requirements of Article III.<sup>7</sup>

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<sup>7</sup> The courts in Indian Territory were held to be legislative courts, *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899); *Wallace v. Adams*, 204 U.S. 415, 422 (1907). While the basis for that holding was not explained, Indian Territory would not seem to differ in this regard from other territories of the United States. The United States Court for China, classified by *dicta* in *Bakelite* (279 U.S., at p. 451) as a legislative court, was similar to the consular courts in being located without the territorial limits of the United States. *Bakelite* (279 U.S., at p. 456) cited *Coe v. United States*, 155 U.S. 76 (1894), as holding the Court of Private Land Claims to be a legislative court. But the holding in *Coe* was expressly limited to the jurisdiction of that Court over claims to land situated in the territories, and *Coe* refused to determine "whether it was within the power of Congress to create a judicial tribunal of this character for the

Consistent with the limited scope of the legislative-court doctrine prior to *Bakelite*, this Court repeatedly classified the Court of Claims as a constitutional court created by the Congress as an inferior court under Article III.<sup>8</sup> The Court of Claims was created in 1855 (10 Stat. 612), but initially had authority only to investigate claims, report upon them to the Congress and recommend bills for enactment by the Congress. In 1863, a broad revision of the law governing the operation of the Court of Claims (12 Stat. 765) purportedly made its judgments final subject to appeal to this Court, but included a provision that no money should be paid out of the Treasury on any adjudicated claim until an appropriation therefor had been estimated by the Secretary of the Treasury. Because of this administrative review to which judgments of the Court of Claims apparently were subjected, *Gordon v. United States*, 2 Wall. 561 (1864), dismissed for want of jurisdiction an attempted appeal from a judgment of the Court. An elaborate opinion prepared for that case by Chief Justice Taney, who died before announcement of the decision in the case, was later published in 117 U.S. 697.

We discuss in a subsequent part of this brief, pp. 53-59, *infra*, the legislative history of these early statutes which, we believe, demonstrates conclusively that the Congress intended at all times to establish the Court of Claims as an inferior tribunal under Article III, even though initially mistaken as to the finality of judgment requisite to such

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determination of title to property situated in the States." 155 U.S., at pp. 85-86. This Court never had occasion to resolve the issue thus left open in *Coe*. See Katz, *Federal Legislative Courts*, 43 H.L.R. 894, 908 (1930). *O'Donoghue v. United States*, *supra* at pp. 550-551, pointed out that no case prior to *Bakelite* could properly be understood as holding the District of Columbia courts to be legislative courts.

<sup>8</sup> Legal writers generally agreed with this classification. See Katz, *Federal Legislative Courts*, 43 H.L.R. 894, 906 (1930), and authorities there cited.

a tribunal. It was this lack of finality, so Chief Justice Taney explained, which prevented the Court of Claims, as initially established, from being an "inferior court," and "this Court . . . cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States." 117 U.S., at pp. 702, 704.

Shortly after the *Gordon* decision, in 1866, the Congress repealed the objectionable provision for administrative review of judgments of the Court of Claims (14 Stat. 9), and this Court thereupon amended its rules to provide for appeals from judgments of that Court (3 Wall. vii-viii). Following these amendments to the statute and to the rules, this Court accepted jurisdiction of the first appeal from a judgment of the Court of Claims, *De Groot v. United States*, 5 Wall. 419 (1866), and, of course, has since taken jurisdiction of countless appeals from such judgments. Viewed in the light of the explanation given by Chief Justice Taney in *Gordon* for the initial rejection of such an appeal, this Court must have considered the Court of Claims to be an inferior tribunal established under Article III once finality of judgment was provided. And, this Court soon so stated, in *United States v. Klein*, 13 Wall. 128, 144-145 (1871), as follows:

"Originally, [the Court of Claims] was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.

"In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay

each claimant. This court being of opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. Since then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.

"The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal lies regularly to this Court."

On numerous subsequent occasions, this Court reiterated the view that the Court of Claims existed under Article III as a constitutional court. In *United States v. Union Pacific R. Co.*, 98 U.S. 569, 603 (1878), for example, this Court stated:

"Congress has, under this authority [Article III], created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution. It has also regulated the appellate jurisdiction of the Supreme Court."

In *United States v. Louisiana*, 123 U.S. 32 (1887), an objection was raised to the jurisdiction of the Court of Claims over a suit brought by a state against the United States. Refuting that objection, this Court first quoted the pertinent language of Article III and then held (*id.*, at p. 35) that:

"The action before us, being one in which the United States have consented to be sued, falls within those designated, to which the judicial power extends; for, as already stated, both of the demands in controversy arise under laws of the United States. Congress has

brought it within the jurisdiction of the Court of Claims by the express terms of the statute defining the powers of that tribunal, unless the fact that a State is the petitioner draws it within the original jurisdiction of the Supreme Court."

See also, *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902); *Kansas v. United States*, 204 U.S. 331, 342 (1907). In *Miles v. Graham*, 268 U.S. 501, 509 (1925), this Court held that imposition of an income tax upon the salary of a judge of the Court of Claims was "forbidden by the Constitution." The reference to the Constitution must have been to that provision in Article III that the compensation of judges of courts established pursuant to that Article "shall not be diminished during their Continuance in Office."

Throughout this period of some 60 years during which the status of the Court of Claims as a constitutional court seemed to be settled, the Congress never took any action to change its status to that of a legislative court. Rather, the Congress in 1877 reenacted the basic jurisdiction of the Court of Claims as a part of the Tucker Act, 24 Stat. 505, and at the same time extended concurrent jurisdiction over the same claims (up to \$10,000) to the federal district courts, which have always been considered to be constitutional courts. See *Mookini v. United States*, 303 U.S. 201, 205 (1938). The Tucker Act was adopted only eight years after this Court, in *United States v. Union Pacific R. Co., supra*, had expressly referred to the Court of Claims as having been created under Article III. The House Report on the bill enacted as the Tucker Act pointed out the advantages of having a court of justice ascertain rights as between litigants, and stated that it was proposed to extend the jurisdiction of the Court of Claims to include

certain claims which "should be asserted before a judicial, not a legislative, tribunal." The Report also added that greater efficiency and justice would be secured "from the separation of the legislative and judicial functions." H. Rept. No. 1077, 49th Cong., 1st Sess., pp. 4, 5.<sup>9</sup>

The Congress in re-enacting a statute is presumed to have adopted the construction given to the same language in the prior statute. See, e.g., *Shapiro v. United States*, 335 U.S. 1, 16 (1948), and cases there cited. In re-enacting as part of the Tucker Act the statutes governing the jurisdiction of the Court of Claims, the Congress must, therefore, have accepted the then settled view that the Court of Claims exercised this jurisdiction under Article III of the Constitution and elected to continue the Court of Claims in existence under Article III as a constitutional court.

Thus, when *Bakelite* came up for decision in 1929, the legislative-court doctrine of the *Canter* case had been limited to territorial and other courts situated outside the boundaries of the United States proper, and the Court of Claims seemed to be firmly established as a constitutional court. *Bakelite*, of course, directly involved the status of

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<sup>9</sup> The concurrent jurisdiction under the Tucker Act of the Court of Claims and the district courts has been a considerable embarrassment to those who would classify the Court of Claims as a legislative court. Insofar as we have discovered, there is not even a hint in the legislative history of the Tucker Act that the Congress invoked its Article I power to pay the debts of the United States in conferring jurisdiction upon the Court of Claims, and invoked its Article III power in conferring the identical jurisdiction upon the district courts. *Williams* suggested that judicial power may be conferred apart from Article III upon constitutional as well as upon legislative courts (289 U.S., at p. 565), but *O'Donoghue*, decided the same day, expressed the orthodox view that the district courts, other than in the District of Columbia, can exercise only Article III jurisdiction (289 U.S., at p. 546), and that view was a cornerstone of the *Bakelite* decision (279 U.S., at p. 449). See the diversity of opinion on this issue in *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 592-594, 609-611, 640-642, 647-649 (1949).

only the Court of Customs Appeals. In holding that Court to be a legislative court, however, *Bakelite* in *dicta* assigned the same classification to a wide variety of courts, including the Court of Claims and the District of Columbia courts, and implicitly rejected the previously accepted limitations on the *Canter* doctrine.

The *Bakelite* opinion stated that "the true test lies in the power under which the court was created and in the jurisdiction conferred," in rejecting a contention that the tenure of the judges should be decisive because that contention "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress. . . ." 279 U.S., at p. 459.<sup>10</sup> No authority was cited for this "true test," and it does not appear to have been enunciated in any of the numerous prior cases in which the issue had been raised. Moreover, "the power under which the court was created" is merely a restatement of the issue of whether a particular court is legislative (created under Article I) or constitutional (created under Article III), and thus does not appear to be a "test" at all unless (as was denied) it refers to congressional intent. While "the jurisdiction conferred" obviously may be important, it had not

<sup>10</sup> Despite this seeming rejection of the relevance of congressional intent, the *Bakelite* opinion found "propriety in mentioning the fact that Congress has always treated" the Court of Claims as a legislative court in that "Congress has required it to give merely advisory decisions on many matters." 279 U.S., at p. 454. *Bakelite* also relied on two cases in which this Court had refused to accept jurisdiction of appeals from advisory decisions of the Court of Claims as demonstrating that "this Court plainly was of the opinion that the Court of Claims is a legislative court. . . ." 279 U.S., at pp. 454-455. However, *Gordon v. United States*, *supra*, and *In re Sanborn*, 148 U.S. 222 (1893), merely applied the rule that this Court will not review non-final judgments and nowhere describe the Court of Claims as a legislative court. We have already shown that this Court has consistently reviewed final judgments of the Court of Claims, and, as we shall show, *O'Donoghue v. United States*, *supra*, subsequently held that the existence of advisory jurisdiction is not inconsistent with Article III status. See pp. 33-34, *infra*.

previously been thought to be decisive. The territorial courts often were given "the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States...." *Reynolds v. United States*, 98 U.S. 145, 154 (1878); see, also, *Mookini v. United States*, 303 U.S. 201, 205 (1938); *The "City of Panama,"* 101 U.S. 453 (1879); *Hornbuckle v. Toombs*, 18 Wall. 648, 656 (1873); *Clinton v. Englebrecht*, 13 Wall. 434, 447 (1871). The Florida superior court involved in the *Canter* case was conferred the same jurisdiction "within its limits, in all cases arising under the laws and constitution of the United States, which . . . was vested in the court of Kentucky district." 1 Peters, at p. 543.

*Bakelite* deemed significant the fact that the Court of Claims and Court of Customs Appeals were "created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." 279 U.S., at p. 451; see, also, pp. 452, 457-458. But this cannot be determinative that the particular judicial tribunal to which such power is committed by the Congress, in its discretion, is a legislative rather than a constitutional court. The federal district courts have often been entrusted with such jurisdiction, as in the Tucker and Tort Claims Act, yet undoubtedly are constitutional courts.<sup>11</sup>

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<sup>11</sup> The references in *Bakelite* to the Court of Claims as a "special tribunal" may indicate that the limited nature of its jurisdiction was a factor contributing to the conclusion reached. If so, that consideration sub-

The *O'Donoghue* and *Williams* cases were decided on the same day in 1933, four years after *Bakelite*. Both cases grew out of a statute (47 Stat. 402) reducing the compensation of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." *O'Donoghue* held that the judges of the District of Columbia courts came within the exception, rejecting the *dictum* in *Bakelite* that such courts were legislative courts. *Williams*, on the other hand, followed the *Bakelite dictum* that the Court of Claims is a legislative court and held that the statute applied to reduce the compensation of the judges of that Court.

*O'Donoghue* reverted to the explanation of *Canter* and the other decisions holding territorial courts to be legislative courts as being based on "the transitory character of the territorial governments," 289 U.S., at p. 536, and thus inapplicable to the District of Columbia courts. The "purely provisional" nature of the territorial courts provides justification for the observation in *Canter* that they "are incapable of receiving" Article III judicial power, but "we are unable to perceive upon what basis of reason it can be said that these courts of the District are *incapable* of receiving the judicial power under Art. III." 289 U.S., at pp. 544-545. Moreover, the "fact that Congress, under another and plenary grant of power, has conferred upon

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sequently was rejected in *Lockerty v. Phillips*, 319 U.S. 182 (1943), which held the Emergency Court of Appeals to be an Article III court. The jurisdiction of that Court, of course, was much narrower than the jurisdiction of the Court of Claims. As *Lockerty* pointed out: "The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Id.*, at p. 187. This long-established rule demonstrates the fallacy in petitioner's contention (Br., p. 14) that Congress must have granted the Court of Claims all the jurisdiction mentioned in Article III in order for Congress to have intended to create the Court of Claims as a constitutional court.

these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question." 289 U.S., at p. 545. "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior courts in the District of Columbia as in the states, whether it has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article?" 289 U.S., at p. 546.

*O'Donoghue* thus enunciated a different "test" for determining the proper classification of a judicial tribunal than did *Bakelite*. Under *O'Donoghue*, a court is an inferior court established under Article III if its jurisdiction extends to cases of the kind enumerated in Article III, and regardless of whether it may also have jurisdiction over non-Article III matters.<sup>12</sup> *O'Donoghue* also held that the tenure during good behavior conferred upon the judges of the District of Columbia courts, and other circumstances in which they had been treated in the same manner as federal district judges, "indicates, with some degree of persuasive force, that Congress entertained the view that the courts of the District and the inferior courts of the United States sitting elsewhere, stood upon the same constitutional footing. In any event, it is not without significance that in the acts of Congress from the beginning of the government to the present day, nothing has been brought to our attention which is inconsistent with that view." 289 U.S., at pp. 549-550. Thus, contrary to *Bakelite*, the intent of the Congress was considered to be significant and life tenure

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<sup>12</sup> This test does not explain the territorial court cases, but as noted, *O'Donoghue* viewed those cases as being based upon the temporary nature of territorial governments which made them incapable of receiving Article III judicial power.

during good behavior relied upon as indicating an intent to create a constitutional court.<sup>13</sup>

In holding the Court of Claims to be a legislative court, *Williams* relied heavily upon the *dictum* to that effect in *Bakelite*, which was said to have been "the result of a careful review of the entire matter," and upon the similarity between the Court of Claims and the Court of Customs Appeals insofar as this issue is concerned. 289 U.S., at pp. 570-571. The contrary views expressed in numerous cases prior to *Bakelite* were said to have been expressed "more or less irrelevantly." 289 U.S., at p. 568. Apparently in deference to the test stated in *O'Donoghue*, however, *Williams* went on to hold that the Court of Claims does not exercise jurisdiction over cases of the kind enumerated in Article III because Article III jurisdiction over "Controversies to which the United States shall be a Party" means only those controversies to which the United States is a party *plaintiff*. 289 U.S., at pp. 571-578. The intention of the Congress in creating the Court of Claims was referred to only by quotation of that part of the *Bakelite* opinion expressing the view that the advisory jurisdiction given to the Court of Claims in some cases demonstrates that the Congress has treated it as a legislative court. 289 U.S., at p. 569.

We believe that *Williams* erred in holding that the Court of Claims does not exercise Article III jurisdiction and in adopting the conclusion in *Bakelite* that the Congress intended to create the Court of Claims as a legislative rather than a constitutional court. Because of the importance of these determinations to the ultimate holding

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<sup>13</sup> See Watson, *The Concept of the Legislative Court*, 10 G.W.L.R. 799, 819-822 (1942), where the conclusion is reached that after *O'Donoghue* intent is the most important criterion.

that the Court of Claims is a legislative court, under the criteria established in *O'Donoghue* and presumably applied in *Williams*, we shall consider each of them in separate sections of this brief. Before doing so, however, it seems appropriate to conclude our discussion of the development of the concept of legislative courts with a brief account of pertinent occurrences subsequent to the *O'Donoghue* and *Williams* decisions in 1933.

*United States v. Sherwood*, 312 U.S. 584, 587 (1941), cited *Williams* and *Bakelite* for the proposition that the Court of Claims "is a legislative, not a constitutional court," which derives its judicial power "from the Congressional power 'to pay the debts . . . of the United States'" rather than from Article III. The status of the Court of Claims was not at issue in the case, however, and this statement was a *dictum* unnecessary to the decision.<sup>14</sup>

The Solicitor General, who had advocated the result reached in *Williams*,<sup>15</sup> concluded, after further consideration, that *Williams* had been wrongly decided and urged, in *Pope v. United States*, 323 U.S. 1 (1944), that *Williams*

<sup>14</sup> *Sherwood* also suggested that the status of the Court of Claims as a legislative court, as well as "the power of the sovereign to attach conditions to its consent to be sued," was a basis for the established rule "that Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims." 312 U.S., at p. 587. However, *McElrath v. United States*, 102 U.S. 426 (1880), which first upheld the absence of jury trial in cases before the Court of Claims, relied entirely upon the power of the Congress to condition its consent to be sued. *McElrath* was decided, of course, during the period prior to *Bakelite* when the Court of Claims had consistently been categorized by this Court as a constitutional court, and demonstrates that there is no inconsistency between that view and the fact-finding procedures of the Court of Claims.

<sup>15</sup> On the ground that *Bakelite* was "a direct and conclusive authority." 289 U.S., at p. 523. The Solicitor General had, however, argued in *Bakelite* that the Court of Customs Appeals was a constitutional court. 279 U.S., at p. 445.

be overruled. But this Court found "no occasion to consider what effect the imposition of non-judicial duties on the Court of Claims may have affecting its constitutional status as a court and the permanency of tenure of its judges," because it was enough for purposes of the issue before the Court "that, although the Court of Claims, like the courts of the District of Columbia, exercises non-judicial duties, Congress has also authorized it as an inferior court to perform judicial functions whose exercise is reviewable here." *Id.*, at pp. 13-14.

The most recent significant decision of this Court for present purposes is that in *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582 (1949). That decision held that the federal district courts could be given diversity jurisdiction over cases between citizens of the District of Columbia and citizens of a state, but the members of the majority were not able to agree upon a common ground. Three members of the majority, in an opinion by Mr. Justice Jackson, were of the view that such jurisdiction could be conferred under the Article I power of the Congress over the District of Columbia, although not under Article III, relying in part upon *Williams*. See *id.*, at pp. 592-594. All other members of the Court, however, rejected this view in opinions which evinced disagreement with the holding in *Williams* that the Court of Claims does not exercise Article III jurisdiction.<sup>16</sup>

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<sup>16</sup> Justices Rutledge and Murphy concurred in the *Tidewater* decision, but on the ground that the District of Columbia is a "State" for purposes of diversity jurisdiction under Article III. In an opinion by Mr. Justice Rutledge, they expressed the view that the Tucker Act jurisdiction of the Court of Claims and the district courts came within the federal-question jurisdiction of Article III, even assuming that *Williams* correctly held Article III jurisdiction over suits to which the United States "shall be a Party" was limited to suits in which the United States is the plaintiff. *Id.*,

*C. The Standards for Classifying A Court As Constitutional or Legislative in Nature.* The foregoing account of the development of the concept of legislative courts reveals the difficulties which this Court has experienced in rationalizing that concept. None of the various rationales which have been put forward from time to time seems to us to be wholly satisfactory. The basic problem, and one which we doubt can be successfully overcome insofar as logic or constitutional theory is concerned, is that the legislative-court concept is not compatible with the language and purposes of Article III or with the separation of powers principle expressed in the Constitution as a whole. If the Article I power of the Congress to pay the debts of the United States authorizes the Congress to establish a court for the exercise of judicial power over claims against the United States apart from Article III and without being subject to the provisions of that Article, the Article I power of the Congress over interstate commerce, for example, should similarly authorize the Congress to establish legislative courts for the exercise of judicial power with respect to issues arising under substantive laws enacted pursuant to the commerce clause. There would seem to be no barrier to the transfer of all federal-question jurisdiction to legislative courts for determination by judges unprotected as to tenure and compensation and thus dependent upon the legislative and executive bodies in a manner which Article III was intended to avoid.

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at pp. 609-610. Chief Justice Vinson, joined by Mr. Justice Douglas, dissenting, agreed, although they thought *Williams* could be justified on another ground. *Id.*, at pp. 640-642, fns. 20, 21. Mr. Justice Frankfurter, joined by Mr. Justice Reed, dissenting, also appeared to agree that the Tucker Act invoked Article III federal-question jurisdiction. *Id.*, at p. 649.

Accepting the fact that the legislative-court doctrine has become too deeply entrenched to be uprooted altogether, the *O'Donoghue* case, in our opinion, adopted a statesman-like accommodation of that doctrine with the language and purposes of Article III. *Canter* and similar cases dealing with the courts of the territories or other extraterritorial courts are to be confined to their own special niche, rather than treated as merely one aspect of a general theory of legislative courts as was attempted in the *Bakelite* opinion. For such courts, it suffices to say that they are "incapable of receiving" Article III judicial power because of their presumably temporary nature or because Article III has historically been considered to be inapplicable outside the limits of the United States proper. But this explanation will not do, as *O'Donoghue* held, for the District of Columbia courts which are situated within the bounds of the United States and which from all that appears were intended to be as permanent as the nature of things allows. The Court of Claims also is situated within the bounds of the United States proper and from all the evidence is a relatively permanent institution, so that it equally will not do to say that the Court of Claims is "incapable of receiving" Article III power.

For such institutions which are not "incapable of receiving" Article III power and which the Congress could establish as inferior courts under Article III, *O'Donoghue* holds that whether the Congress "has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by additional congressional legislation, enacted under Article I . . . , imposing upon such courts other duties . . . . The two powers

are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause [in Article I] of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and adequate." 289 U.S., at p. 546.

The "inquiry" thus posed in *O'Donoghue* accords with the purposes of Article III and provides an appropriate means for distinguishing true courts exercising judicial power from administrative agencies exercising executive or delegated legislative powers.<sup>17</sup> If the Congress confers upon an institution the power to render final judgments with respect to any cases of the kind enumerated in Article III, then that institution is an Article III court and its members are judges entitled to the protections provided in Article III with respect to their tenure and compensation. This protection of the independence of the institution in question cannot be destroyed by the fact that the Congress may have, and may have exercised, the power under Article I to confer non-judicial functions on that institution. Hence, all federal judicial power of the kind encompassed by Article III will be exercised by independent Article III courts, except in the territories or otherwise outside the limits of the United States proper where unique circumstances may justify an exception. As *O'Donoghue* also illustrates, if there is any doubt as to whether a particular institution was intended by the Congress to be an

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<sup>17</sup> *Old Colony Tr. Co. v. Comm'r Int. Rev.*, 279 U.S. 716, 726 (1929), for example, held the Board of Tax Appeals, now the Tax Court, to be an administrative agency rather than a court. Since the Tax Court is expressly declared to be "an independent agency in the Executive Branch of the Government," 26 U.S.C. § 7441, it is difficult to see how any other conclusion could be reached. See *Commissioner v. Gooch Co.*, 320 U.S. 418, 420 (1943).

Article III court exercising Article III judicial power, the tenure provided and other indicia of the intent of the Congress may be consulted.

The standards proclaimed in *O'Donoghue* are the most recent expression by this Court on the subject,<sup>18</sup> as well as affording an appropriate accommodation of Article III with the legislative-court doctrine. While *Williams* is somewhat confusing in that it quotes extensively from the *Bakelite* opinion which applied a wholly different test, there is every reason to believe that this Court in *Williams* accepted and sought to apply the views expressed in *O'Donoghue*. The *O'Donoghue* and *Williams* opinions were both written by Mr. Justice Sutherland and were delivered on the same day. As we have shown, *Williams* held that the Court of Claims did not exercise any jurisdiction over cases of the kind enumerated in Article III, and adopted the *Bakelite* view that the Congress has consistently treated the Court of Claims as a non-Article III institution. See pp. 35-36, *supra*. If those conclusions were correct, then the Court of Claims would not be an Article III court under the standards established in *O'Donoghue*. But, as we now attempt to demonstrate, those conclusions with respect to the nature of the jurisdiction of the Court of Claims and to the intent of the Congress were in error.

D. *The Court of Claims Exercises Article III Jurisdiction.* The principal jurisdiction of the Court of Claims is that conferred by the Tucker Act over "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an

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<sup>18</sup> While all the opinions in the *Tidewater* case touched upon this problem, none did so in detail and, of course, none was joined by a majority of the Court.

executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491. Concurrent jurisdiction over such claims, where not exceeding \$10,000 in amount, also was conferred by the Tucker Act upon the federal district courts. 28 U.S.C. § 1346(a)(2). A number of statutes confer jurisdiction upon the Court of Claims to render judgments upon claims against the United States arising from particular circumstances.<sup>10</sup> Appellate jurisdiction is exercised by the Court of Claims over determinations of the Indian Claims Commission, 25 U.S.C. § 70s, and over final judgments of the federal district courts in cases arising under the Tort Claims Act where the appellees consent in writing to the taking of an appeal to the Court of Claims, 28 U.S.C. § 1504. Finally, the Court of Claims has "jurisdiction to report to either House of Congress on any bill referred to the court by such House, except a bill for a pension, and to render judgment if the claim against the United States is . . . one over which the court has jurisdiction under other Acts of Congress." 28 U.S.C. § 1492.

The Court of Claims renders final judgment (subject to review by this Court) on cases brought under the

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<sup>10</sup> The Court of Claims has jurisdiction to: determine the amount due to or from the United States on certain unsettled accounts of its officers, agents and contractors, 28 U.S.C. § 1494; render judgment upon claims for damages by persons unjustly convicted and imprisoned by the United States, 28 U.S.C. § 1495; render judgment upon certain claims by federal disbursing officers, 28 U.S.C. § 1496; render judgment upon certain claims for damages to oyster growers, 28 U.S.C. § 1497; award compensation for use or manufacture of patented articles without license or other lawful right, 28 U.S.C. § 1498; render judgment on claims for certain penalties withheld by the United States, 28 U.S.C. § 1499; render judgment upon any set-off or demand asserted by the United States against a plaintiff, 28 U.S.C. § 1503; determine certain Indian claims, 28 U.S.C. § 1505; and to render judgment on claims transmitted by the Comptroller General and which would be within the jurisdiction of the Court if voluntarily brought by the claimant, 28 U.S.C. § 2510.

jurisdiction thus conferred, with the very limited exception of congressional reference cases not otherwise within the jurisdiction of the Court. The United States is a party to all of the cases brought in the Court of Claims, and Article III of the Constitution expressly provides that the "judicial Power shall extend . . . to Controversies to which the United States shall be a Party. . . ." *Williams* held, however, that this language in Article III should not be given its plain meaning, but rather is to be construed as extending the judicial power of the United States only to those controversies in which the United States is a party *plaintiff*. Since the United States is the defendant in litigation brought in the Court of Claims, *Williams* concluded that the Court of Claims was not exercising Article III judicial power in deciding that litigation. 289 U.S., at pp. 571-578.

We believe that the restricted interpretation given by *Williams* to "Controversies to which the United States shall be a Party" cannot be justified from the language and history of Article III or in reason. But assuming, *arguendo*, that that interpretation was proper and should be adhered to, *Williams* erred in failing to consider and to recognize that the Court of Claims exercises federal-question jurisdiction within the meaning of the provision in Article III extending the judicial power to all cases "arising under this Constitution [and] the Laws of the United States. . . ."

The language, "Controversies to which the United States shall be a Party," could hardly be plainer. Certainly, "party," when used in connection with a case or controversy and without a qualifying adjective, normally would not be understood as necessarily referring to the plaintiff. It is almost beyond belief that the framers of a document as carefully drafted as the Constitution of the United States would have failed to use the language "con-

troversies to which the United States shall be a plaintiff" if that was what they intended. *Williams* did not refer to anything said in the debates at the Constitutional Convention to support its interpretation, and we have not discovered any such support.<sup>20</sup>

The term "party" also appears in that part of Article III conferring upon this Court original jurisdiction over all cases "in which a State shall be a Party." In the early and well-known case of *Chisholm v. Georgia*, 2 Dall. 419 (1793), this Court accepted original jurisdiction of an action brought against the State of Georgia by a citizen of another state. The attorney for the plaintiff was Edmund Randolph, a member of the Constitution Convention and Attorney-General of the United States at the time. He argued, among other things, that (2 Dall., at p. 420):

"1st. The constitution vests a jurisdiction in the supreme court over a state, as a defendant, at the suit of a private citizen of another state. Consult the letter of the constitution, or rather the influential words of the clause in question. The judicial power is extended to controversies between a state and citizens of another state. I pass over the word 'between,' as in no respect indicating who is to be plaintiff or who defendant. In the succeeding paragraph, we read a comment on these words, when it is said that in cases in which a state shall be a *party* the supreme court shall have original jurisdiction. Is not a defendant a *party*, as well as a plaintiff?" (Emphasis in the original.)

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<sup>20</sup> Madison's Journal of the Constitutional Convention shows that the language in question was inserted in Article III by an amendment proposed by Madison and by Gouverneur Morris, which amendment was approved apparently without opposition or debate. See III Documentary History of the Constitution of the United States of America 626 (Department of State, 1900).

Mr. Justice Blair, also a member of the Constitutional Convention, stated in his opinion (2 Dall., at p. 451) that:

"After describing, generally, the judicial powers of the United States, the constitution goes on to speak of it distributively, and gives to the supreme court original jurisdiction, among other instances, in the case where a state shall be a *party*; but is not a state a party as well in the condition of a defendant, as in that of a plaintiff? And is the whole force of that expression satisfied, by confining its meaning to the case of a plaintiff-state? It seems to me, that if this court should refuse to hold jurisdiction of a case where a state is a defendant, it would renounce part of the authority conferred, and consequently, part of the duty imposed on it by the constitution; because, it would be a refusal to take cognisance of a case, where a state is a party."

Mr. Justice Wilson, another member of the Constitutional Convention, in deciding that "the state of Georgia is amenable to the jurisdiction of this court," stated that this view was "confirmed, beyond all doubt, by the direct and explicit declaration of the constitution itself." 2 Dall., at p. 466. He referred, particularly, to the provision of Article III extending the judicial power to "Controversies between two or more States" as demonstrating conclusively that there was no intention to exclude jurisdiction of cases in which a state was a defendant. Justices Blair and Wilson were joined by Chief Justice Jay, one of the authors of *The Federalist*, and by Justice Cushing, while Justice Iredell dissented.

The ruling in *Chisholm v. Georgia*, made some six years after the Constitution was drafted and participated in by prominent members of the Constitutional Convention,

seems to us virtually conclusive that the term "party" as used in Article III was not intended to be limited to plaintiffs. It is hardly conceivable that the term as used in the phrase extending the judicial power to controversies "to which the United States shall be a Party" was intended to refer only to the United States as a plaintiff, if the term as used in the phrase conferring original jurisdiction upon this Court over cases "in which a State shall be a Party" applies whether the state is a plaintiff or a defendant.

The Eleventh Amendment to the Constitution, adopted in reaction to the decision in *Chisholm v. Georgia*, *supra*, withdrew from the federal courts all jurisdiction over suits against a state by citizens of another state or of a foreign nation. But with respect to those cases and controversies to which Article III judicial power continued to extend, an original action still may be brought in this Court against a state. Thus, *United States v. Texas*, 143 U.S. 621, 643-644 (1892), held that the original jurisdiction of this Court in cases to which a state shall be a party "necessarily refer[s] to all cases mentioned in the preceding clause [of Article III] in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff." See, also, *Minnesota v. Hitchcock*, 185 U.S. 373, 388 (1902); *Kentucky v. Denison*, 24 How. 66, 98 (1860). This doctrine was recently reaffirmed in the Tidelands cases. See *United States v. Louisiana*, 339 U.S. 699, 701-702 (1950); *United States v. Texas*, 339 U.S. 707, 709-710 (1950).

In *Minnesota v. Hitchcock*, *supra*, this Court expressly held that the judicial power over controversies to which the United States shall be a party included cases in which the United States is a party defendant. That was an original action by Minnesota in this Court to enjoin the

Secretary of Interior and the Commissioner of the General Land Office. In order for such jurisdiction to attach, the State had to establish that the case came within one of the categories in paragraph 1, section 2 of Article III to which the judicial power of the United States extends. 185 U.S., at p. 383. This Court held that:

"This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant." 185 U.S., at p. 384.

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"While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition." 185 U.S., at p. 386.

See, also, *Kansas v. United States*, 204 U.S. 331, 342 (1907).

The most tangible reason given by the *Williams* opinion for overruling *Hitchcock* and rewriting the plain language of the Constitution was that, because of the sovereign immunity of the United States from suit, "it is not reasonably possible to assume that it was within the contemplation of the framers of the Constitution that the words, 'controversies to which the United States shall be a party,'

should include controversies to which the United States shall be a party *defendant.*" 289 U.S. at p. 577.<sup>21</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890), was strongly relied upon for this proposition. That case held that a state could not be sued in the federal courts by one of its citizens, without its consent, under that part of Article III extending the judicial power to cases arising under the laws and Constitution of the United States. In so ruling, the majority opinion animadverted on the decision in *Chisholm v. Georgia, supra*, and expressed agreement with the dissent of Mr. Justice Iredell in that case. (But see *South Dakota v. North Dakota*, 192 U.S. 286, 318 (1904), where this court refused to be bound by the approval in *Hans* of the Iredell dissent and took jurisdiction of a suit by one state against another even though the defendant state had not consented to suit.)

With all due respect, we submit that *Williams* missed the point of the *Hans* decision and of Justice Iredell's dissent.

<sup>21</sup> *Williams* also relied upon the fact that the provision relating to "controversies to which the United States shall be a party" omitted the word "all" which is found in provisions relating to certain other jurisdictional categories, such as "all cases of admiralty and maritime jurisdiction." 289 U.S., at pp. 572-573. But as Mr. Justice Story pointed out, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 334-336 (1816); "In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power . . . to *all* cases; and in the latter class, to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate." Thus, "although it might be fit, that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognisance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognisance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply." See, also, II Story On the Constitution, § 1675, p. 459 (4th ed.).

They did not hold or contend that the judicial power never could extend to a case in which a state was a defendant, but only that a state could not be made a defendant without its consent; i.e., unless the state waived its sovereign immunity. Thus, *Hans* said that the "suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia*; . . ." 134 U.S., at p. 16 (emphasis added). "Undoubtedly a State may be sued by its own consent, as was the case in *Curran v. Arkansas et al.*, 15 How. 304, 309, and in *Clark v. Barnard*, 108 U.S. 436, 447." 134 U.S., at p. 17. The *Barnard* case referred to was one brought in a federal court in which a state was held to have consented to suit by entering a voluntary appearance. The Eleventh Amendment provides "an immunity which a State may waive at its pleasure . . . as by a general appearance in litigation in a federal court . . . or by statute." *Petty v. Tennessee-Missouri Comm'n.*, 359 U.S. 275, 276 (1959).

While Justice Iredell's dissent is not as clear as it might be, he nowhere explicitly objected to the holding of the majority in *Chisholm v. Georgia* that this Court's original jurisdiction over cases "in which a State shall be a Party" extended to cases in which a state was a defendant. His objection appears to have been directed at the further holding of the majority that Georgia did not have the defense of sovereign immunity to the claim made in that suit, because such immunity had been waived by ratification of the Constitution, or because the states were no longer sovereigns, or because the concept of sovereign immunity should not be adopted in this country—all of which were suggested in one or more of the separate opinions written

by the four Justices in the majority. Mr. Justice Iredell based his dissent on the premise that (2 Dall., at p. 436):

"The authority extends only to the decision of controversies in which a state is a party, and providing laws necessary for that purpose. That surely can refer only to controversies in which a state *can* be a party; in respect to which, if any question arises, it can be determined, according to the principles I have supported, in no other manner than by reference either to pre-existent laws, or laws passed under the constitution and in conformity to it." (Emphasis in the original.)

He then examined the petition of right and other actions in which a suit against the Crown had been permitted, and determined to his satisfaction that they were inapplicable to the suit at bar. 2 Dall., at pp. 436-448.

The *seriatim* opinions in *Chisholm v. Georgia*, including that of Justice Iredell in his discussion of the petition of right, show that the concept of waiver of sovereign immunity was known when the Constitution was adopted.<sup>22</sup> In the debates at the Virginia Convention on ratification of the Constitution, Madison defended the provision of Article III conferring jurisdiction over controversies between a state and a foreign nation, as he did not "conceive that any controversy can ever be decided, in these [Article III] courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made." Similarly, Marshall at the same Con-

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<sup>22</sup> Appendix B to the Brief for the United States in *Pope v. United States*, 323 U.S. 1 (1944), contains a detailed resume of the development of the concept of sovereign immunity, and demonstrates that this concept was recognized both in English law and in the States prior to adoption of the Constitution. See, also, II Story On the Constitution, § 1678, pp. 460-462 (4th ed.).

vention and with respect to the same subject, stated that: "The previous consent of the parties is necessary; and, as the federal judiciary will decide, each party will acquiesce." See *Monaco v. Mississippi*, 292 U.S. 313, 323-324 (1934), where these statements are quoted and which held that a foreign nation may not invoke the original jurisdiction of this Court over suits to which a state is a party *except* where the state has consented to suit.<sup>23</sup>

It is difficult to believe that the framers of the Constitution did not contemplate the possibility that the United States, as well as its component states, might waive its sovereign immunity so as to be amenable to suit, or that Article III was intended to extend the judicial power to suits against the states when such consent is given but not to suits against the United States when such consent is given as in the Tucker Act. We are convinced, therefore, that suits against the United States in the Court of Claims are "Controversies to which the United States shall be a Party" to which the judicial power extends under Article III, and that *Williams* erred in holding to the contrary.

Assuming, however, that *Williams* was correct in this holding, the opinion in that case failed to consider the possibility that the Court of Claims exercises Article III judicial power by reason of the provision extending that power to cases arising under the Constitution and laws of the United States. That the jurisdiction conferred by the Tucker Act comes under this category of Article III judicial power seems to have been the view of six of the Justices in the *Tidewater* case. See p. 37, fn. 16, *supra*. We do not see how any other conclusion can be reached

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<sup>23</sup> Hamilton, in *The Federalist*, No. 81, stated that: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." (Tudor Pub. Co. ed., 1937; emphasis in the original.) See, also, *Cohens v. Virginia*, 6 Wheat. 264, 378 (1821).

with respect to Tucker Act jurisdiction over claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . . ." Tucker Act jurisdiction over claims founded "upon any express or implied contract of the United States," extends only to those contracts authorized by statute, *Eastern Extension Tel. Co. v. United States*, 251 U.S. 355 (1920), so that such claims also arise under the laws of the United States. "Congress can authorize the making of contracts; it can therefore authorize suit thereon in any district court." *National Ins. Co. v. Tidewater Co.*, *supra* at p. 649 (dissenting opinion of Mr. Justice Frankfurter). Moreover, as Chief Justice Vinson contended in the *Tidewater* case, *supra* at pp. 641-642, fn. 21: "Since any right of action against the United States is completely and wholly dependent upon whether an Act of Congress has authorized the suit . . . , a question arising under the laws of the United States, as that phrase is used in Art. III, is clearly presented by any claim against the federal government."

For the reasons stated, we believe that the Court of Claims does exercise Article III judicial power, that *Williams* erred in reaching the contrary conclusion, and that that erroneous conclusion was fundamental under the standards established in the *O'Donoghue* case to the ultimate holding in *Williams* that the Court of Claims is a legislative court. Should there be any remaining doubt that the Court of Claims was created as a constitutional court to exercise Article III judicial power, however, it is appropriate, as *O'Donoghue* holds, to look to the tenure of the judges and other indicia of the intent of the Congress. We demonstrate in the next section of this brief that the Congress undoubtedly intended to create the Court of Claims under Article III and for that Court to exercise Article III judicial power.

**E. The Congress Intended to Create the Court of Claims under Article III.** The statutes governing the constitution and operation of the Court of Claims have always, since that Court was first established in 1855, provided life tenure during good behavior for the judges of the Court. The same circumstance with respect to the judges of the District of Columbia courts was said by *O'Donoghue* to indicate "with some degree of persuasive force" that such courts "stood upon the same constitutional footing" as did the other federal district courts. 289 U.S., at pp. 549-550. We need not rely upon that factor alone, however, because the legislative history of the statutes basic to the creation of the Court of Claims establishes beyond any reasonable doubt, we believe, that the Congress intended to create the Court of Claims under Article III as a constitutional court.

The status of the Court of Claims in the governmental hierarchy was developed and, it was supposed, determined during the first eleven years of its existence. The bill initially introduced, in 1854, proposed the establishment of a board of three commissioners. Cong. Globe, 33d Cong., 2d Sess., p. 70. Senator Hunter stated that he would "vastly prefer, on account of the tenure, that, instead of commissioners appointed for four or five years, and removable at the pleasure of the President, we should have two judges sitting here, who should hold their offices as judges do under the Constitution of the United States;" thus, he was in favor of a "court" rather than a board of commissioners. *Id.*, at p. 71. Senator Jones thought that "there is but one safe mode of doing it, and that is to establish a court of claims—an independent judiciary, upon the same principle as the Supreme Court." *Id.*, at p. 74. Others spoke in favor of a court, only Senator Brodhead supported a board of commissioners, and the

bill was referred back to a select committee, on motion of Senator Jones, "to make a bill that may be acceptable to all." *Id.*, at p. 73; see, generally, pp. 71-74.

The select committee reported back an amended bill providing for a "Court of Claims" of three judges holding office during good behavior. *Id.*, at pp. 105-106. Senator Weller proposed an amendment to create a board of commissioners, because: "Under the Constitution of the United States, if there be a court established, the judges of that court are to be appointed during good behavior." *Id.*, at p. 107. After considerable debate, this proposed amendment was rejected. *Id.*, at pp. 107-114. Senator Hunter stated that there were only two alternatives—a court whose members would have tenure during good behavior or a board whose members could be removed at any time by the President, and that the nature of the tribunal proposed and of its jurisdiction made particularly important that it be an independent court. *Id.*, at pp. 108-109. While Senators Weller, Chase and Butler did not see how a true court could be established unless given the power to render final judgments rather than the mere reports to Congress which were proposed (*id.*, at pp. 110, 112), Senators Stuart and Douglas disagreed and substantially concluded the debate by stating their belief that the bill would establish "a court under the provisions of the Constitution, and that the Constitution prescribes the tenure of office." *Id.*, at p. 113. Senator Clayton had expressed the same thought, and also noted that Article III judicial power expressly extended to controversies to which the United States shall be a party as would be true of "every one of these private claims on the government. . . ." *Id.*, at p. 111.

The Senate bill was passed by the House without debate. *Id.*, at p. 909. The Senate debates are sufficient to demonstrate, however, that the choice was believed to be between

a court established under Article III and staffed by judges holding office during good behavior as provided in Article III, and an administrative board or commission. The majority clearly elected to create an Article III court, even though they mistakenly thought that finality of judgment was not necessary for a judicial decision. Thus, the bill that became law on February 24, 1855, 10 Stat. 612, did not give finality to the decisions of the court which were made subject to review and approval by the Congress.

A few years later, President Lincoln recommended that the decisions of the Court of Claims be made final, stating that the "investigation and adjudication of claims, in their nature belong to the judicial department" and should be removed from the legislature. Cong. Globe, Dec. 3, 1861, Appendix, p. 2, 37th Cong., 2d Sess. A bill was introduced increasing the number of judges on the Court of Claims to five, making its judgments final, and providing for appeal from such judgments to the Supreme Court. In the House debates on this bill, it was generally recognized that the Court of Claims was a court only in name because its judgments lacked finality, and that the bill in effect would, as stated by Representative Diven, establish a new court with "all the paraphernalia and dignity of a court of the United States. . . ." Cong. Globe, 37th Cong., 2d Sess., p. 1672.<sup>24</sup> Whether this should be done was the principal issue in the debate.

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<sup>24</sup> See, also, statements of Representatives Porter, Watts, Bingham and Hickman. *Id.*, at pp. 1673-1674. Representatives Bingham (*id.*, at p. 1674) and Pendleton (*id.*, at p. 1676), in supporting the bill against objections that it was dangerous to permit the Court of Claims to render final judgments obligating the payment of money out of the Treasury, pointed out that the judges could be impeached for any misfeasance or malfeasance in office, thus implying that they could not otherwise be removed under the Constitution.

During the course of this debate, Representative Hickman, the Chairman of the Judiciary Committee, stated that the bill reported "proposes to make this organization a court, and to give it the powers of a court, and the determinations of a court," *id.*, at p. 1674, but stated that in his opinion the bill should provide for removal of the judges "at the pleasure of the Executive," that he saw no reason why this would not be feasible, and that he intended to offer an amendment to that effect. *Id.*, at p. 1675. The following colloquy then occurred (*id.*, at p. 1675):

"Mr. SHELLABARGER: I wish to make an inquiry of the learned chairman of the Judiciary Committee. I understand him to take the ground—and I suppose it is the true one—that this is intended to be a court within the meaning of the Constitution. If that be so, then I wish to make an inquiry in relation to a point to which he has just alluded, and which is an important one, and which he proposes to bring before the House in the shape of an amendment. My inquiry is whether it is competent to provide that the judges of any court shall be removable at the pleasure of the Executive—whether their tenure is not during good behavior?

"Mr. HICKMAN: Well, sir, the objection which has been raised by the gentleman from Ohio proves conclusively that the present is no court. The suggestion which he has made proves that conclusively; and if the amendment which I have suggested is objectionable—and it may be so; it occurred to me on the spur of the moment—of course I do not insist upon it. It strikes me that it may be objectionable."

Representative Hickman in fact did not insist upon his proposed amendment, and the bill as passed by the House shortly thereafter (*id.*, at p. 1677) and eventually enacted

(12 Stat. 765) provided the judges of the Court of Claims with life tenure during good behavior. In the light of this colloquy, there is little room for doubt that the House intended the Court of Claims to be a constitutional court established under Article III when that Court was substantially reconstituted in 1863. While this issue was not sharply raised during the Senate debate on the bill passed by the House, it seems relatively clear that the Senate shared the same purpose.<sup>25</sup>

The statute thus enacted in 1863 expressly made judgments of the Court of Claims final and provided for appeal to the Supreme Court. The statute also included a provision, however, that no money should be paid out of the Treasury on any claim adjudicated by the Court of Claims until an appropriation therefor had been estimated by the Secretary of the Treasury.<sup>26</sup> We have already referred to the holding in *Gordon v. United States, supra*, that this

<sup>25</sup> Senator Trumbull, in reporting the bill, stated that the Court of Claims had been initially established "with a view of sending all claimants to a judicial tribunal," but this purpose had failed of achievement because the judgments of the Court of Claims were not final—which defect would be remedied by the proposed bill. Cong. Globe, 37th Cong., 3d Sess., p. 303. Senator Sherman referred to the Court of Claims as an "inferior tribunal" created by the Congress, and composed of persons "appointed to hold their office during good behavior." *Id.*, at p. 399. Senator Cowan rebutted an argument to the effect that no state had theretofore surrendered power over claims against it to a court, by pointing out that: "The Constitution of the United States provides that the judiciary shall have cognizance of all cases in which the United States is a party." *Id.*, at p. 416. Senator Bayard expressed the opinion that the determination of claims "ought to be a judicial act" rather than a matter for the legislature, noting, among other things, that Congress did not have tenure unlike the judges of the Court of Claims. *Id.*, at p. 419.

<sup>26</sup> The provision in question was added by an amendment proposed on the floor of the Senate, and approved without debate after the floor leader for the bill (Senator Trumbull) accepted the amendment and expressed the view that it made no change in established procedures. Cong. Globe, 37th Cong., 3d Sess., p. 426; see, also, Cong. Globe, 39th Cong., 1st Sess., p. 770.

provision subjected the judgments of the Court of Claims to administrative and legislative review so as to prevent such judgments from being final for purposes of appeal to this Court. Shortly thereafter, in 1866, the provision in question was repealed (14 Stat. 9) so as to remove this objection to review of Court of Claims judgments (see Cong. Globe, 39th Cong., 1st Sess., pp. 770-771), and, as we have shown, this Court subsequently has accepted jurisdiction of appeals from such judgments. See pp. 26-28, *supra*.

We submit, therefore, that the Congress in the first eleven years of the existence of the Court of Claims, during which its organization and jurisdiction were substantially settled, was constantly motivated by the purpose of constituting the Court of Claims as a true Article III court, acting promptly to correct deficiencies in the basic statutes which were found to interfere with that purpose. The judges of the Court of Claims were given life tenure during good behavior, and at no time did the Congress indicate anything other than a purpose to create a constitutional court under Article III.

We have already referred to the re-enactment, in the Tucker Act, of the basic jurisdiction of the Court of Claims at a time when decisions of this Court seemed to have settled the status of the Court of Claims as a constitutional court. See pp. 29-30, *supra*. That circumstance, together with the fact that the Tucker Act conferred concurrent jurisdiction upon the federal district courts, provides an additional indication of the consistent congressional treatment of the Court of Claims as an Article III court. Further evidence is provided by the appellate jurisdiction of the Court of Claims over decisions of the federal district courts under the Tort Claims Act, where the appellees consent in writing to the taking of an appeal to the Court

of Claims. 28 U.S.C. §1504. It is hardly conceivable that the Congress would have provided for such appeals from decisions of constitutional courts unless the Court of Claims was also considered to be a constitutional court. Finally, as we noted at the outset, the Congress in 1953 concluded after thorough consideration that the Court of Claims had initially been created as an Article III court and enacted a statute declaring it to be "a court established under article III of the Constitution of the United States." See pp. 13-14, *supra*.

Insofar as the *Williams* opinion reveals, the legislative history and other circumstances discussed above were not considered in reaching the conclusion that the Court of Claims was created as a legislative court. We believe that the intent of the Congress should be considered and given weight by this Court, and that the evidence of congressional intent set forth above buttresses our contention that the Court of Claims was created under Article III for the exercise of Article III judicial power.

## II

### The Status of the Court of Claims As A Constitutional Court Since the 1953 Act Cannot Validly Be Questioned

The Congress in 1953, as previously noted, enacted a statute which declares the Court of Claims "to be a court established under article III of the Constitution of the United States." 67 Stat. 226, 28 U.S.C. § 171. This statute was intended to express the conclusion of the Congress that the Court of Claims was initially created and has always existed under Article III (see pp. 13-14, *supra*), and obviously presents no problem if the contrary conclusion in *Williams* is overruled as we believe should be done for the reasons already stated. Certainly, the decision in *Wil-*

*liams* was not an easy one and we think it probable that a different conclusion would have been reached if this Court, when that case was decided, had had the benefit of the Congressional declaration contained in the 1953 Act. But even if *Williams* is reaffirmed in holding that the Court of Claims initially was created under Article I, the 1953 Act, as we show below, validly established the Court of Claims as an Article III court on and subsequent to the effective date of that Act.

Petitioner contends that the 1953 Act is "ineffectual," and presumably unconstitutional, because the "Congress is completely without power under the Constitution to alter the status of an Article I court *merely* by declaration of intention as to its constitutional status made many years after the court's creation. In other words, a court assumes a definite status at the time of its establishment and, absent changes in the character, function, power or jurisdiction of that court, such status constitutionally does not and can not change." (Br., p. 15.) The *Bakelite*, *Williams* and *Tidewater* cases are cited for this proposition, but none of those cases involved such a declaration by the Congress or even expressed any views upon the effect that such a declaration might have.<sup>27</sup>

Assuming, as we must for present purposes, that the Congress can establish courts for the exercise of judicial power under either Article I or Article III of the Constitution, we fail to see why the Congress should be

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<sup>27</sup> *Bakelite* did state that an argument as to congressional intent based on the tenure of the judges of the Court of Customs Appeals "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U.S., at p. 459. We have shown, however, that the subsequent *O'Donoghue* decision disregarded this "true test" and relied in part upon the intent of the Congress as disclosed by the life tenure given to the judges of the District of Columbia courts. See p. 34, *supra*.

"completely without power" to alter the status of an Article I court to that of an Article III court by an express statutory declaration to such effect. Nothing in the Constitution provides in effect that "once an Article I court always an Article I court," and we do not perceive any persuasive reason why such a rule should apply.

It is important to remember in this regard that the Court of Claims was held by *Williams* to exercise judicial power, even though not Article III judicial power; and *Williams* further held that this judicial power could be conferred upon an Article III court. After referring to the provisions of the Tucker Act, *Williams* said (289 U.S., at pp. 565-566) that:

"By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellate jurisdiction of this court in respect of the judgments of that court could be sustained, or *concurrent* jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution.

"That judicial power apart from that article may be conferred by Congress upon legislative courts, as well as upon constitutional courts, is plainly apparent from the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511, 546, dealing with the territorial courts. . . . The validity of this

view is borne out by the fact that the appellate jurisdiction of this court over judgments and decrees of the legislative courts has been upheld and freely exercised under acts of Congress from a very early period, a practice which can be sustained, as already suggested, only upon the theory that the legislative courts possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution.” (Emphasis in the original.)

This concept of two kinds of “judicial power,” which appear to be identical in all respects except for the Article of the Constitution under which the Congress is deemed to have acted in conferring such power, is, of course, inconsistent with our analysis of the Constitution and with the limited scope of the legislative-court concept which we advocate in Part I of this Argument. If the Congress under Article I can confer “judicial power” upon non-Article III courts permanent in nature and situated within the boundaries of the United States proper, then the purpose of Article III to protect the independence of the judiciary in the exercise of the “judicial Power of the United States” can readily be frustrated and the principal justification for our espousal of the test stated in *O'Donoghue* would be subverted. See pp. 38-41, *supra*.

In this Part of our Argument, however, we are assuming, *arguendo*, that *Williams* was correctly decided, and this assumption requires an adjustment in our frame of reference. While it is perhaps unnecessary to accept everything that was said in *Williams* in order to reaffirm the holding that the Court of Claims was created under Article I, we do not see how acceptance of the concept of two kinds of judicial power can be escaped. As *Williams* conceded in

the above quotation, that concept is essential to any reasonable contention that the holding in *Williams* is consistent with the Tucker Act jurisdiction of the federal district courts and with review by this Court of the judgments of the Court of Claims. We do not believe that there is any serious possibility that this Court, any more than the Court in *Williams*, is prepared to hold invalid the established practice of many years standing with respect to those two matters.

Accepting for present purposes, therefore, the concept of two kinds of judicial power which was an essential premise of the *Williams* decision, it must be conceded that: (1) The basic jurisdiction of the Court of Claims requires the exercise of judicial power; (2) this judicial power, even though conferred under Article I, can be exercised by both Article I and Article III courts; and (3) this judicial power, therefore, can be exercised by the Court of Claims either as an Article I court or as an Article III court. Based upon these premises, we submit that the issue of whether the Court of Claims is to exercise this judicial power as an Article I court or as an Article III court is for the Congress to determine.

If the judicial power exercised by the Court of Claims may be conferred upon either a legislative court or a constitutional court, what objection can there be to effectuating an express declaration by the Congress concerning the nature of the court upon which it chooses to confer the judicial power? Article III authorizes the Congress to "ordain and establish" inferior courts. How can it be held that the Congress has not ordained and established an inferior court under Article III in the face of an express statutory declaration by the Congress that it has done just that? If the Congress should establish a new court in a statute expressly stating that the Congress

acted pursuant to Article III, and the jurisdiction of the Court of Claims was transferred to this new court, could anyone reasonably contend that the court thus established was not a constitutional court created under Article III?

To be sure, this hypothetical new court would be rather an oddity as it would not exercise any Article III judicial power even though created under Article III, if *Williams* correctly held that none of the jurisdiction of the Court of Claims comes within Article III judicial power. Our reasons for believing that *Williams* erred in this holding have been stated. Chief Justice Vinson, in the *Tidewater* case, contended that the ultimate holding in *Williams* categorizing the Court of Claims as a legislative court could and should be explained on other grounds, and that the views expressed in *Williams* concerning the non-article III nature of the jurisdiction of the Court of Claims could and should be disregarded even if the ultimate holding is accepted. 337 U.S., at pp. 640-642, fns. 20, 21. But, in any event, the oddity of an Article III court exercising only Article I judicial power is inherent in the concept, relied upon in *Williams*, of two kinds of "judicial power" both of which may be exercised by an Article III court, and does not involve any insuperable theoretical difficulties if that concept is accepted.<sup>28</sup>

Assuming that the Congress could create a new Article III court and confer upon that court the jurisdiction now exercised by the Court of Claims, surely the Congress

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<sup>28</sup> The settled rule is that Article III does not itself confer jurisdiction upon an inferior court created by the Congress under that Article, and that the Congress may regulate the Article III jurisdiction of an inferior Article III court in such manner as it deems fit. See, e.g., *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-234 (1922). Thus, there does not appear to be anything in Article III requiring the Congress to confer some Article III jurisdiction upon an inferior court created under Article III.

could also change the constitutional basis for the Court of Claims by an express declaration that henceforth the Court of Claims is to be an inferior court existing under Article III. The Constitution can hardly be thought to compel the Congress to go through the purely mechanical process of first abolishing the Court of Claims and then reconstituting it under the same or another name in order to achieve its future existence as an Article III rather than an Article I court.

It is true, as the committee reports demonstrate, that the Congress in the 1953 Act intended to express its determination that the Court of Claims had initially been created under Article III. See pp. 13-14, *supra*. But even if that determination was mistaken and ineffectual insofar as the past status of the Court of Claims is concerned, the declaration of Congress in the 1953 Act is entitled to prospective effect. Thus, in *Postmaster-General v. Early*, 12 Wheat. 136, 148-149 (1827), this Court, in an opinion by Chief Justice Marshall, held that:

"It is true, that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law, does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction."

See, also, *United States v. Clafin*, 97 U.S. 546, 548-549 (1878).

The principle of the *Early* case plainly is applicable here, assuming that the Congress was mistaken in the view that the Court of Claims initially was created under Article III. The 1953 statute declared that view in language capable of being given future effect, even though inoperative on the past, by declaring the Court of Claims "to be a court established under article III of the Constitution of the United States." There is nothing in the Constitution of which we are aware to prevent the judges of the Court of Claims from continuing to serve without reappointment. They already had life tenure during good behavior, as required by Article III, and were originally appointed by the President and confirmed by the Senate, as required by section 2 of Article II. It is well established that the "Congress may increase the powers and duties of an existing office without thereby rendering it necessary that the incumbent be again nominated and appointed." *Shoemaker v. United States*, 147 U.S. 282, 301 (1893). If so, it should also be possible to change the constitutional basis for an office without making it necessary to reappoint the incumbent, particularly where, as here, no material change in functions or duties is involved.

Even if the Court of Claims was a legislative court prior to the 1953 Act, this meant only that it was authorized under Article I and not that it had no constitutional basis at all. Moreover, as we have shown, the judges of the Court of Claims prior to 1953 exercised judicial power identical with that exercised by federal district judges in Tucker Act cases. The only significant aspect of the assumed change of status from a legislative to a constitutional court is that the Congress no longer can diminish the compensation of the judges of the Court of Claims during their continuance in office. The surrender of this right hardly suffices, however, to require that incumbent judges again be nominated

and confirmed. Certainly, neither the President nor the Congress has thought so.

The petitioner in *Lurk v. United States*, No. 481, has expressed concern about the power of the Court of Claims to continue rendering reports to the Congress in congressional reference cases, if held to be a constitutional court. This does not seem to us to be a serious problem. If the Congress pursuant to its plenary power over the District of Columbia can require Article III courts in the District of Columbia to undertake legislative or advisory functions, as the *O'Donoghue* case held, surely the Congress may require the Court of Claims to render reports in congressional reference cases pursuant to the plenary power of the Congress over payment of the debts of the United States even though the Court of Claims be an Article III court. See *Pope v. United States*, 323 U.S. 1, 13-14 (1944).<sup>29</sup> Professor Moore has so concluded. See 1 *Moore, Federal Practice*, pp. 72-73 (2d ed.).

In any event, there is no apparent reason why the judges of the Court of Claims may not voluntarily render reports to the Congress in congressional reference cases, even if the Court of Claims as such cannot be required to do so. See *United States v. Ferreira*, 13 How. 40, 49-51 (1851); *Hayburn's Case*, 2 Dall. 409 (1792). Indeed, this view of its function in reference cases was adopted by the Court of Claims many years ago. In *Sanborn v. United States*, 27 C. Cls. 485, 490 (1892), it was stated that:

"I am also aware that the Supreme Court held, in an early decision, reported in a note to *Ferreira's* case

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<sup>29</sup> *Harrison v. Moncravie*, 264 Fed. 776, 781-782 (C. A. 8, 1920), appeal dismissed, 255 U.S. 562 (1921), held that the rule against exercising jurisdiction over matters in which a final judgment could not be entered applied only with respect to the jurisdiction of the Supreme Court, and that all Article III inferior courts could take jurisdiction of such matters. See, also, *Wallace v. Adams*, 204 U.S. 415, 423 (1907).

(13 Howard 52) that a technically judicial court can not be authorized to perform extra judicial services; but I can see no reason why the judges, acting collectively in the name of the court, may not voluntarily perform such services when designated to do so by act of congress, as well as judges of the Supreme Court designated by their official position to sit in other extra judicial tribunals. (Act January 29, 1877, ch. 37, sec. 2; 19 Stat. L., 228)."

The statute thus cited provided for the services of five Justices of the Supreme Court on the Commission established to determine disputed electoral votes in the Hayes-Tilden election. More recent examples that come to mind include the voluntary services of individual Justices in connection with the Pearl Harbor investigation and the Nuremberg War Crimes Trials. In addition, many Article III judges perform services in connection with the Judicial Conference, and this Court collectively acts in what appears to be a quasi-legislative capacity in promulgating the Admiralty, Civil and Criminal Rules pursuant to statutory authorization (28 U.S.C. §§ 2072, 2073; 18 U.S.C. §§ 3771, 3772).

The validity of the congressional reference jurisdiction of the Court of Claims is not in issue in this case, and, for the reasons stated, we do not anticipate any serious problem in defending that jurisdiction if the issue should arise. In any event, the possible doubts about this matter were brought to the attention of the House Judiciary Committee by Judge Madden in testifying with respect to the bill that became the 1953 Act,<sup>30</sup> and Senator Gore also discussed this problem during the Senate debates on that bill. 99 Cong. Rec. 8943-8944. Hence, the Congress by enacting

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<sup>30</sup> The hearings held by that Committee have not been printed.

the 1953 legislation must have elected to remove any question as to the status of the Court of Claims as a constitutional court regardless of whether the jurisdiction of the Court over congressional reference cases might be affected.

We submit, therefore, that the declaration by the Congress in the 1953 Act that the Court of Claims is a constitutional court created under Article III should be given effect for the period since the enactment of that statute, even if the Court of Claims previously was a legislative court.

### Conclusion

Petitioner does not contend that the assignment of Judge Madden to serve on the Court of Appeals for the Second Circuit was invalid for any reason other than its contention that he was a Judge of a legislative court—the Court of Claims. For the reasons stated above, we believe that the Court of Claims was created as a constitutional court and that the contrary decision in *Williams* should be overruled as wrongly decided. In any event, the 1953 Act validly establishes the status of the Court of Claims as a constitutional court since 1953. The decision below, therefore, should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1961

The Glidden Company, Inc., Petitioner

v.

Omega Zeinak, et al.

BY WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DEFENDANT-TRAIRES

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# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 242

THE GLIDDEN COMPANY, ETC., PETITIONER  
*v.*

OLGA ZDANOK, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The majority (R. 2-10) and dissenting (R. 11-12) opinions of the court of appeals are reported at 288 F. 2d 99.

### JURISDICTION

The judgment of the court of appeals was entered on March 28, 1961 (R. 13). Petitions for rehearing and for rehearing in banc were denied on April 24, 1961 (R. 14-15). The petition for a writ of certiorari was filed on July 21, 1961, and granted on October 9, 1961 (R. 15).

### QUESTION PRESENTED

The order granting certiorari limited the writ to question (d) presented by the petition. Question (d) reads:

(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?

This question, in our view, comprises the following subsidiary questions:

1. Whether petitioner has standing to challenge, for the first time in this Court, the authority of Judge J. Warren Madden, a judge of the Court of Claims, who pursuant to designation and assignment participated in the consideration and decision of the appeal in petitioner's case in the Court of Appeals for the Second Circuit.
2. Whether, assuming the Court of Claims to be a "legislative" court, its judges can be constitutionally authorized by Congress to serve on the courts of appeals.
3. Whether the Court of Claims is and has been a court created under Article III of the Constitution.

#### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

The constitutional provisions and statutes involved are set forth in Appendix A, *infra*, pp. 113-129.

#### **STATEMENT**

On March 28, 1961, a divided panel of the United States Court of Appeals for the Second Circuit, consisting of two regular judges of that court (Chief Judge Lumbard and Judge Waterman) and Judge J. Warren Madden, a regular member of the United States Court of Claims, sitting by designation,<sup>1</sup> re-

<sup>1</sup> The designation, made by the Chief Justice under the authority of 28 U.S.C. 293(a) (Appendix A, *infra*, p. 114), appears at page 8a of the Appendix to the brief of petitioner.

versed a judgment for petitioner rendered by the District Court for the Southern District of New York (185 F. Supp. 441) in a suit for damages for breach of contract brought by respondents, members of a labor union (R. 1-13).<sup>2</sup> Judge Madden wrote the majority opinion (R. 2-10) and Chief Judge Lumbard dissented (R. 11-12).

Following denial by the court of appeals of petitions for rehearing and for rehearing in banc which did not raise the issue of Judge Madden's participation (R. 14-15), petitioner filed in this Court a petition for a writ of certiorari, question (d) of which was whether the participation by a Court of Claims judge in the judgment of the court of appeals "vitiate[d] the judgment" (R. 15). The petition challenged the constitutionality of the Act of July 28, 1953, c. 253, § 1, 67 Stat. 226 (Appendix A, *infra*, pp. 128-129), which amended Section 171 of Title 28 of the United States Code (the Code provision establishing the Court of Claims (Appendix A, *infra*, p. 114)) by declaring that court to be a court established under Article III of the Constitution (see *infra*, pp. 21, 26-36). On October 9, 1961, this Court granted certiorari, limiting the writ to question (d), and, pursuant to 28 U.S.C. 2403, certified to the Attorney General that the constitutionality of the 1953 Act, *supra*, was drawn in question (R. 15-16). The government thereafter filed a petition for leave to intervene, which was granted by the Court on October 23, 1961.

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<sup>2</sup> The suit, originally brought in a New York state court, was removed to the district court on the basis of diversity of citizenship. The merits of the controversy have no present relevance.

**SUMMARY OF ARGUMENT****I**

Judge Madden was at least a *de facto* judge of the court of appeals, and petitioner cannot challenge his authority for the first time in its petition for certiorari.

There can be no question that the *office* which Judge Madden held during the appeal of petitioner's case to the Second Circuit—the office of circuit judge of the Court of Appeals for the Second Circuit—is a lawful or *de jure* one. The designation of Judge Madden by the Chief Justice to sit on the court of appeals was regularly made in accordance with statutory authority. The rule is well settled in the federal courts that where a judge, in good faith and under color of authority, is in actual possession and discharging the duties of a *de jure* office, a party litigant has no standing (at least, once the judge has performed his judicial functions) to challenge the title of the judge to hold the office or his exercise of judicial authority, whether he is regularly or temporarily filling the office. (See the government's brief in *Lurk v. United States*, No. 481, this Term, at pp. 5-8, 27-39).

**II**

Judge Madden is, and was in 1961 (when he sat in petitioner's case), an Article III *judge*, fully competent to sit on the court of appeals or any Article III court to which he might be assigned pursuant to statute. He has life tenure and performs judicial duties. The provision of the 1953 Act that the Court

of Claims "is hereby declared to be a court established under article III of the Constitution" means, at the least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court. If they were not such before, since the 1953 statute those judges have been Article III judges in the same category as the judges appointed to the ordinary Article III courts. No difficulty is raised by the fact that Judge Madden may also be called to sit in a "legislative" court (if the Court of Claims be deemed such). See the government's brief in *Lurk v. United States*, No. 481, this Term, at pp. 9-12, 43-51.

### III

The Court of Claims was validly created by Congress as an Article III court.

A. Congress desired by the 1953 Act to repudiate, so far as constitutionally possible, this Court's interpretation in *Ex parte Bakelite Corporation*, 279 U.S. 438, and *Williams v. United States*, 289 U.S. 553, of the power Congress exercised in establishing the Court of Claims, and to declare authoritatively that it acted under Article III.

1. The language of the amendment shows that its purpose was, not to make the court an Article III court, but to declare that it was already such.

2. The legislative history confirms this aim.

a. The report of the House Judiciary Committee accompanying H.R. 1070, 83d Congress (the bill which became the 1953 Act) expressly stated that it was the purpose of the bill to reject the *Bakelite* and *Williams*

decisions and to declare unequivocally that the Court of Claims "was in fact established as, and continues to be, a constitutional court."

b. Although there is language in the report (and a "corrected" report) of the Senate Judiciary Committee, accompanying a companion Senate bill, which would suggest that it was the purpose of the bill to "make" the court an Article III court, and although some of the remarks made during the Senate debates were of a like tenor, the statements in question, when read in context, are consistent with the view that the purpose of the Senate bill was likewise declaratory. The substitution in the "corrected" report of the statement that the committee "is of the opinion that Congress intended it [the Court of Claims] to have been so created [*i.e.*, under Article III]" for the statement that the committee "is of the opinion that it more properly should have been so created" shows that the committee desired to express its disagreement with the *Williams* decision on this point, and confirms the declaratory purpose of the Senate bill. Moreover, the House bill (the declaratory purpose of which was clear) was substituted for the Senate bill during the Senate debates, and was the one enacted.

B. Apart from the 1953 declaration, there exist strong historical grounds for holding that the *Bakelite* and *Williams* cases erred in ruling that the Court of Claims was not an Article III court.

1. Congress intended the Court of Claims to be an Article III court.

a. The court was created by the Act of February 24, 1855. It was given the power to "hear and deter-

mine all claims [against the United States] founded upon any law of Congress, or upon any regulation of an executive department or upon any contract, express or implied, with the government of the United States." Its judges have had life tenure from the beginning. Its decisions, however, did not originally have finality; in the beginning the court was limited to preparing bills for congressional enactment giving effect to its judgments (where favorable to the claimants). With the exception of this lack of finality (a bar to Article III status which was soon removed), the court had all the attributes of an Article III tribunal, and the debates in Congress reflect that it was the legislative intent to establish the court in the exercise of Article III authority. The debates revolved principally around the question whether the body to be established would be a "court of claims" or a "board of commissioners". It was assumed by all that, if the advocates of a "court" prevailed, the judges of the court would be required by Article III to hold tenure during good behavior. The advocates of a "court" did prevail and the Act explicitly provided for life tenure.

b. When it became apparent, soon after the creation of the court, that the congressional objective was being defeated by the lack of finality in the court's decisions, Congress, in 1863, attempted to give finality to the court's judgments, subject to a limited right of review by this Court. A clause of the 1863 Act (§ 14), providing that no money should be paid out of the Treasury for any claim passed upon by the court until

after an appropriation therefor had been "estimated for by the Secretary of the Treasury," was held by this Court in *Gordon v. United States*, 2 Wall. 561, 117 U.S. 697, to be a bar to review by this Court because of the continuing impediment to finality which this Court thought the clause presented. Shortly following this decision (in 1866), the clause was repealed, and thereafter this Court took appeals without question from the judgments of the Court of Claims. Thus, insofar as Congress was able to do so, it finally committed the determination of claims against the United States to the judiciary, and established the Court of Claims as a national tribunal for the hearing and decision of such claims, subject only to review by this Court. The court then became an Article III tribunal.

c. The vesting of concurrent jurisdiction of claims against the United States (up to certain amounts) in the regular federal courts (circuit and district) by the Tucker Act of 1887 further evidenced Congress's understanding of the Article III status of the Court of Claims.

d.-e. Congress's treatment of the Court of Claims as an integral part of the federal judicial establishment in the Judicial Code of 1911 further indicated its understanding of the court's Article III status. And in 1946, in the Federal Tort Claims Act, Congress gave the Court of Claims appellate jurisdiction (concurrent with the courts of appeals) to review district court judgments under that Act.

2. From 1866 to 1929 this Court uniformly assumed, and repeatedly declared, the Court of Claims

to be an Article III tribunal. *United States v. Klein*, 13 Wall. 128, 144-145 (1871); *United States v. Union Pacific Railroad Co.*, 98 U.S. 569, 603 (1878); *United States v. Louisiana*, 123 U.S. 32, 35 (1887); *Minnesota v. Hitchcock*, 185 U.S. 373, 384, 386 (1902); *Kansas v. United States*, 204 U.S. 331, 342 (1907); *Miles v. Graham*, 268 U.S. 501 (1925).

3. a. In 1929, it was suggested for the first time that Article III was not the source of the judicial power exercised by the Court of Claims. *Ex parte Bakelite Corporation*, 279 U.S. 438, held that the Court of Customs and Patent Appeals was a "legislative court" created by Congress under its Article I power to lay and collect duties on imports, and that it derived none of its authority from Article III. That court was declared to be a "special tribunal" created "to examine and determine various matters \* \* \* which from their nature do not require judicial determination and yet are susceptible of it" (279 U.S. at 451), and it was held that such a tribunal could not be an Article III court. The Court, in a *dictum*, said that the Court of Claims was likewise in this category. But the cases cited in the opinion for the proposition that a court established to determine matters susceptible of but not requiring judicial determination may not be a constitutional court do not support it. And no reason grounded in policy or logic can be suggested for that view. The fact that a court's business consists exclusively of matters which *need* not have been submitted for judicial determination would seem to be irrelevant in determining the nature of the power exercised by the court. The important con-

sideration is that the matters were in fact committed to judicial determination, and that the court's decisions are final and not revisable by the executive or legislative branch. Various matters have, historically, been submitted to constitutional courts although they could have been determined non-judicially, as the *Bakelite* opinion inferentially recognized. The creation of special Article III courts to exercise particular types of jurisdiction is not foreign to our history, and this Court has indicated that nothing in the Constitution prevents Congress from limiting the jurisdiction of the inferior tribunals established under Article III.

b. In *Williams v. United States*, 289 U.S. 553 (1933), the *Bakelite* *dictum* as to the character of the Court of Claims ripened into a holding. It was held that the judges of the Court of Claims, because the court was not an Article III tribunal, lacked the protection afforded by Article III against salary diminution during continuance in office. The Court conceded that the Court of Claims "undoubtedly \* \* \* exercises judicial power," and that on several occasions prior to the *Bakelite* case it had declared the Court of Claims to be an Article III court. It adhered, however, to its more recent *dictum* in the *Bakelite* case and the rationale underlying it.

A second basis of the *Williams* decision—one not considered in *Ex parte Bakelite*—was that "Controversies to which the United States shall be a Party" (as used in Article III) do not include suits *against* the United States because so to construe the phrase would be inconsistent with the principle of sovereign

immunity. This rationale, in addition to being opposed to the Court's own prior pronouncements is, we submit, unsound in principle and contrary to the clear intent of the framers of the Constitution.

4. The flaw in the Court's reasoning is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. From the correct premise that the phrase "Controversies to which the United States shall be a Party" was not intended as a blanket consent by the sovereign to be sued, the Court incorrectly concluded that this prevented application of the provision even where consent had been given by Congress.

a. While the doctrine of sovereign immunity was a "well settled and understood" rule at the time of the framing of the Constitution, it was also well known, both in England and in a number of the original states, that the sovereign could and often did waive immunity and consent to be sued.

b. The waiver of sovereign immunity was thus a common practice in Anglo-American law at the time of the adoption of the Constitution. Against the century-old background of suits by consent against the Crown and the State, the use of the unqualified phrase "Controversies to which the United States shall be a Party" bespeaks an intention to extend the judicial power to cases where the United States is a party defendant upon a waiver of immunity, as well as where it is plaintiff. Nothing in the proceedings of the Constitutional Convention indicates that the phrase in question was being used in a restrictive sense. The views of Marshall, Madison, and Hamil-

ton, referred to in the *Williams* opinion, were addressed solely to the question whether there had been a surrender by the States of their immunity to suit "in the plan of the convention." Their denial that there had been such a surrender was not meant to suggest that suits against the government, with the consent of the government, would not be embraced within Article III. In fact, in the Virginia debates on the Constitution, both Madison and Marshall expressly acknowledged that, if a state consents to be sued by a foreign nation, Article III would authorize jurisdiction in the federal courts over such a suit, by virtue of the clause in Section 2 extending the federal judicial power to controversies "between a State \* \* \* and foreign States \* \* \*." See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-324.

c. Contrary to the suggestion in the *Williams* case, the Judiciary Act of 1789 is authority for, rather than against, the view that Article III extends the judicial power to suits against the United States. That Act gave the circuit courts jurisdiction of civil suits where the matter in dispute exceeded \$500 "and the United States are plaintiffs, or petitioners." The statute and its history contradict the suggestion, implicit in *Williams*, that Congress intended by the Act to vest in the circuit courts all the judicial power (with respect to "Controversies to which the United States shall be a Party") which Article III confers. The limitation of the authority conferred by the statute to suits by the United States shows merely that the statute was not intended to exhaust the judicial power

conferred in Article III, and that it was not meant to operate as a consent to suit.

d. Less than five years after the Constitution became effective, all but one of the justices of this Court, in their capacity as judges of the federal circuit courts, assumed that suits against the United States (on pension claims, sovereign immunity having been waived) were cognizable in those courts if the requirement of judicial finality was met. *Hayburn's Case*, 2 Dall. 409 (1792). This was also the assumption of *United States v. Ferreira*, 13 How. 40 (1851).

5. A question not considered in the *Williams* opinion is whether cases heard by the Court of Claims do not fall within the "federal question" jurisdiction defined in Article III ("Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, \* \* \*"). We believe the issues the court decides come under this category as well. This is so even with respect to claims based on contract, since all federal contracts must stem from some congressional authority. To the extent that the power of the court extends to the adjudication of claims founded on the Constitution, any Act of Congress, or any regulation of an executive department, there can be no doubt on the point. The fact that this Court has regularly granted review of Court of Claims judgments since its decisions were given finality in 1866, and in particular has granted review since *Williams* was decided, shows that this Court has considered that these cases present federal question issues within the scope of Article III. In addition, the same authority exercised by the Court of Claims is also

exercised by the district courts (subject to a \$10,000 limitation). It would be incongruous to suppose that such claims involve "federal question" issues in the district courts but not in the Court of Claims.

C. Doubt as to the nature of the Court of Claims should be resolved in favor of its Article III genesis, in the light of Congress's 1953 declaration. This Court should accord great weight to a formal and authoritative declaration by Congress, as the creator of a judicial tribunal, proclaiming which of its powers it exercised in bringing the court into being.

D. There is no constitutional obstacle to the conclusion that the Court of Claims was validly established by Congress under Article III.

1. That the Court of Claims lacked the power to render final judgments prior to 1866 is consistent with the view that it acquired Article III status when, in that year, that power was given to it.

a. This Court saw no constitutional difficulty with this conclusion when, in *United States v. Klein*, 13 Wall. 128, 144-145, it observed that the Court of Claims, though originally a court "merely in name," was, after 1866, "one of those inferior courts which Congress authorizes."

b. The transition of the court to Article III status in 1866 did not require reappointment and reconfirmation of the incumbent judges. As a result of the transition, Congress gave up its power to reduce the judges' tenure and diminish their compensation, but Congress has often made far more drastic alterations in the tenure or compensation of incumbent officials

without encroaching upon the Presidential power of appointment.

c. If it be assumed that the transition of the court to Article III status could not be effected without giving the President the right to reappoint the incumbent judges or to make new appointments, and the Senate the right to approve or reject the nominees, those rights were waived. In any case, the only judges about whose tenures even a theoretical question could arise were those sitting on the effective date of the 1866 Act.

d. If the court did not become an Article III tribunal in 1866, it became one in 1911 when it was reconstituted by the Judicial Code. At that time, this Court had repeatedly declared that the Court of Claims was an Article III tribunal, and Congress, in reenacting the organic legislation establishing the court, must be presumed to have intended to adopt the then settled view as to its character.

2. The vesting in the court of certain non-judicial functions of an essentially advisory nature (its so-called congressional and departmental reference jurisdiction—only the former of which it still retains) did not affect its Article III status.

a. The granting of these special advisory functions to the court could not have impaired its constitutional character as a tribunal deriving its authority from Article III if, as we maintain, it had that status previously.

b. But we do not believe that the vesting of these additional functions was inconsistent with the court's Article III nature. *O'Donoghue v. United States*, 289

U.S. 516, indicates that the possession by a federal court of some powers and functions not judicial in character is compatible with its status as an Article III court. That decision, holding the superior courts of the District of Columbia to have been established under Article III, recognized the authority of Congress, under its plenary power to legislate for the District, to vest in the courts of the District, in addition to their Article III judicial functions, administrative and legislative functions. The rationale of the *O'Donoghue* case is equally applicable to the Court of Claims. That court has its headquarters at the seat of government, within the area over which Congress possesses exclusive power to legislate. Congress can, pursuant to the same authority which it exercises in conferring non-judicial powers on the courts of the District, constitutionally vest similar powers in the Court of Claims, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept. It is true that the functions of the Court of Claims are national in scope and that its jurisdictional subject matter and area of interest are in no sense confined to the geographical limits of the District of Columbia. But it is also true that neither the judicial nor the non-judicial functions of the ordinary superior courts of the District are limited to matters of concern only to the District.

In addition, we suggest that Congress may properly draw upon its other Article I powers in adding certain non-judicial functions to the Court of Claims. The plenary power of Congress "to pay the Debts \* \* \* of the United States" (Article I, Section 8,

clause 1) sustains the establishment of such non-judicial machinery. This Court and individual justices have rejected, in general terms, the exercise by federal courts, other than the District of Columbia courts, of non-judicial functions. But the Court's concern for the nationwide federal court system suggests that there well may be a difference, with respect to joinder of non-judicial with judicial functions, between the regular federal courts and the special constitutional tribunals. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment apply with less force to the specialized tribunals with their limited functions and areas of responsibility. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both Article III powers and certain non-judicial functions pertaining to matters falling within the field of its judicial competence.

#### IV

If the Court, adhering to its *Williams* decision, should hold that the congressional assumption underlying the declaration in the 1953 Act—that the Court of Claims already was an Article III court—is insupportable on historical or other grounds, the Act should be given at least prospective effect—that is, the court should be held to have been made an Article III tribunal by that Act. Cf. *Postmaster-General v. Early*, 12 Wheat. 136, 148–149. We believe there are no valid constitutional objections to such an interpretation of the 1953 Act (see *supra*, pp. 14–17).

**ARGUMENT****INTRODUCTION**

In 1929, in an extended *dictum* in *Ex parte Bakelite Corporation*, 279 U.S. 438, 451-455, this Court declared the Court of Claims to be a legislative court, created by Congress pursuant to its power under Article I of the Constitution to pay the debts of the United States,<sup>3</sup> and not one of the courts, inferior to this Court, which Article III, Section 1<sup>4</sup> authorizes Congress from time to time to ordain and establish, and in which (and in this Court) is vested “[t]he judicial Power of the United States.”<sup>5</sup> The principal rationale of the Court’s conclusion was that the Court of Claims was created and had been maintained “as a special tribunal to examine and determine claims for money against the United States”; that this was a function which, though “susceptible of determination by courts,” also admits of “legislative or executive determination”; that Congress, as a consequence, need never have established a court to discharge this function, but could have reserved to itself the power

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<sup>3</sup> Article I, Section 8, clause 1 (Appendix A, *infra*, p. 113).

<sup>4</sup> Appendix A, *infra*, p. 113.

<sup>5</sup> The court directly involved in the *Bakelite* case was the Court of Customs and Patent Appeals, which the decision held to be a legislative court, similar in character to the Court of Claims and certain other courts discussed in the opinion. In our brief in *Lurk v. United States*, No. 481, this Term (to be argued immediately before this case), we urge that the Court of Customs and Patent Appeals was created as, and has always been, a court established under Article III, and that the *Bakelite* decision, in holding to the contrary, reached an erroneous conclusion from mistaken premises and failed to take adequately into account the pertinent historical materials.

to pass upon such claims, or committed them to the determination of executive departments (as Congress in fact had done for some sixty-five years following the adoption of the Constitution); and that courts which have been

created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it

are necessarily legislative courts, and cannot have been established under the regular court-creating authority vested in Congress by the Judiciary Article (279 U.S. at 451-452).

Four years later, the views expressed in the *Bakelite* case as to the nature of the Court of Claims ripened into an explicit holding that the court was a legislative and not an Article III tribunal—with the consequence, the Court held, that its judges did not enjoy the protection against salary reduction during continuance in office which Article III guarantees to the judges of courts established by or under that article. *Williams v. United States*, 289 U.S. 553. In a decision rendered the same day, the Court reached the opposite conclusion as to the superior courts of the District of Columbia (*O'Donoghue v. United States*, 289 U.S. 516)—though in so doing it was required to repudiate *dictum* to the contrary in the *Bakelite* case (289 U.S. at 550; 279 U.S. at 450, 460).

The Court, in *Williams*, acknowledged that the Court of Claims “undoubtedly \* \* \* exercises judicial power” (289 U.S. at 565), and conceded that

the power it exercises comes literally within the scope of one of the heads of judicial power defined in Article III, *viz.*, "Controversies to which the United States shall be a Party" <sup>6</sup> (289 U.S. at 573). It held, however, that (*ibid.*)—

in the light of the rule, then well settled and understood, that the sovereign power is immune from suit, the conclusion is inadmissible that the framers of the Constitution intended to include suits or actions brought *against* the United States. [Emphasis added.]

The Court thought it a necessary consequence of the doctrine of sovereign immunity that the phrase "Controversies to which the United States shall be a Party" in Article III had to be understood as though it read "Controversies to which the United States shall be a Party *plaintiff*"—with the result that, since the United States is the *defendant* in the claims proceedings heard by the Court of Claims, the controversies decided by that court fall outside the scope of the Article III phrase and do not involve the "judicial power of the United States" as defined in that article (289 U.S. at 571–578).

In the *Williams* case the government, largely on the authority of the opinion in *Ex parte Bakelite*,<sup>7</sup> had argued that the Court of Claims was a legislative court. Brief for the United States, Nos. 728, 729, and 730, October Term, 1932, pp. 4–10. In 1944, in *Pope v. United States*, 323 U.S. 1, the government reversed its position on the basis of a more thorough

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<sup>6</sup> Article III, Section 2 (Appendix A, *infra*, pp. 113–114).

<sup>7</sup> In *Bakelite*, the Solicitor General had argued that the Court of Customs and Patent Appeals is an Article III court.

study of the pertinent historical materials and argued that the Court of Claims was an Article III court. Brief for the United States, No. 26, October Term, 1944, pp. 60-103. It contended that the *Williams* decision should be overruled for the reasons that it was "not [in] accord with prior authority or with constitutional history, \* \* \* based upon a mistaken premise, and \* \* \* rendered without the aid of considerable relevant historical material." *Id.*, p. 61. The Court found it unnecessary, however, to reach the issue. 323 U.S. at 13-14.

In the Act of July 28, 1953, 67 Stat. 226, Congress "declared" the Court of Claims "to be a court established under article III of the Constitution of the United States", and provided that circuit and district judges could be assigned temporarily to sit on the court. By the Acts of July 9, 1956, 70 Stat. 497, and August 25, 1958, 72 Stat. 848, 28 U.S.C. 293, the judges of the Court of Claims were made eligible for temporary assignment to district courts and courts of appeals. In recent years, a number of circuit and district judges, as well as Justices Reed and Burton, have sat upon the Court of Claims, and Judge Madden of the Court of Claims has sat upon the courts of appeals. So far as we are aware, the petition for certiorari in this case was the first challenge to this practice.

Before discussing the fundamental question of the validity of the declaration in the Act of July 28, 1953, that the Court of Claims is established under Article III, we shall argue that (1) Judge Madden was at least a *de facto* judge whose authority cannot first

be challenged in a petition for certiorari to this Court (Point I, *infra*, pp. 23-24), and (2) at least since 1953 Judge Madden has been an Article III judge, constitutionally competent to sit on any Article III court, whatever is or has been the character of the Court of Claims (Point II, *infra*, pp. 25-26).

In Point III, *infra*, pp. 26-107, we shall argue that the Court of Claims is and has been an Article III court, and that the Act of July 28, 1953, merely confirmed that status. The legislative history of the 1953 statute makes clear that Congress intended to repudiate—insofar as it was constitutionally possible for it to do so—this Court's interpretation in the *Williams* decision (and the *dictum* in the *Bakelite* opinion) as to which of its constitutional powers Congress exercised and intended to exercise in establishing the Court of Claims. We shall then show that, apart from the 1953 congressional declaration, there exist strong historical grounds, not adequately taken into consideration by the Court in *Bakelite* and *Williams*, for holding that those cases reached an erroneous conclusion as to the nature of the Court of Claims. The judges of the court have possessed life tenure from the time of the court's creation (in 1855); it has had the power to render final decisions since as long ago as 1866; and at least since the latter date it has been deciding "Controversies to which the United States shall be a Party" and "Cases \* \* \* arising under [the] Constitution [and] \* \* \* Laws of the United States" within the scope of those clauses of the Judiciary Article. We shall then argue that any doubt that might survive as to the court's true nature should

be resolved, in the light of the formal and authoritative 1953 declaration by Congress, as the court's creator, in favor of the court's genesis under Article III.

Finally, we shall contend in Point IV, *infra*, pp. 108-111, that the 1953 Act should at least be given prospective effect, *i.e.*, that the Court of Claims be held to have acquired Article III status as of the date of the Act's enactment.

## I

### JUDGE MADDEN WAS AT LEAST A *De Facto* JUDGE OF THE COURT OF APPEALS, AND PETITIONER CANNOT CHALLENGE HIS AUTHORITY FOR THE FIRST TIME IN ITS PETITION FOR CERTIORARI

As in the case of Judge Jackson in the *Lurk* case, No. 481, there can be no question that the *office* which Judge Madden held during the appeal of petitioner's case to the Second Circuit—the office of circuit judge of the Court of Appeals for the Second Circuit—is a lawful or *de jure* one. The assignment of Judge Madden was authorized by a law of Congress, 28 U.S.C. 293(a) (Appendix A, *infra*, p. 114), and his designation by the Chief Justice of the United States to sit on the court of appeals was made under and in accordance with that Act. There is no challenge to the regularity of that designation. Judge Madden, in good faith, filled the office to which he had been assigned and exercised the normal judicial functions incident thereto. Petitioner did not challenge his authority at any time while the case was in the court of appeals, either in the briefs or at the argument of the appeal, or in the petition for rehearing. The

first challenge came in the petition for certiorari. In the circumstances, we submit that Judge Madden was, at the least, a *de facto* judge whose title to office is not subject to attack by the petitioner in this Court.

As we show in more detail in our brief in *Lurk*, No. 481, pp. 27-39, the rule is settled in the federal courts that where a judge, in good faith and under color of authority, is in actual possession and discharging the duties of a *de jure* office, a party litigant has no standing (at least, once the judge has performed his judicial functions) to challenge the title of the judge to hold the office or his exercise of judicial authority, whether he is regularly or temporarily filling the office. *E.g., Ex parte Ward*, 173 U.S. 452; *McDowell v. United States*, 159 U.S. 596. This doctrine is grounded upon principles of public policy to avoid the confusion, uncertainty, unfairness, and delay which would result from challenges to the authority of public officers, particularly after they have completed their duties. We know of no federal case which has allowed a litigating party, aware of the facts relating to a possible challenge to a judge's participation, to wait until after he has performed his functions before making the challenge—on appeal or certiorari.

## II

JUDGE MADDEN IS, AND WAS IN 1961, AN ARTICLE III JUDGE, FULLY COMPETENT TO SIT ON ANY ARTICLE III COURT TO WHICH HE MIGHT BE ASSIGNED PURSUANT TO STATUTORY AUTHORITY

Again like Judge Jackson, in the *Lurk* case, No. 481, Judge Madden is (and was in 1961, when he sat in petitioner's case) an Article III *judge* fully competent to sit on the court of appeals of any Article III court to which he might be assigned pursuant to statute. He has all the qualifications of an Article III judge. He has life tenure and performs judicial duties. The provision of the 1953 Act that the Court of Claims "is hereby declared to be a court established under article III of the Constitution of the United States" means, at the very least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court. If they were not such before, those judges have been Article III judges since the 1953 statute, in the same category as the judges appointed to the various district courts and courts of appeals.

No difficulty is raised by the fact that Judge Madden may also be called to sit in a "legislative" court (if the Court of Claims be deemed such). On that

tribunal, his duties would be primarily if not entirely judicial, and the issues with which he would be concerned would arise under the Constitution and laws of the United States. Article III judges may constitutionally exercise judicial power not stemming from Article III, at least so long as it is of the same kind as the power specified in that Article. And Article III *judges* (as distinguished, perhaps, from Article III *courts*) may also validly perform certain non-judicial functions—as the course of our history proves. Under our view, the judges of the Court of Claims would remain Article III judges even if Congress abolished the court and ended or transferred its functions. See *Donegan v. Dyson*, 269 U.S. 49 (Commerce Court judge).

For a further discussion of this point, the Court is respectfully referred to our brief in the companion *Lurk* case, No. 481, app. 43–51.

### III

#### THE COURT OF CLAIMS WAS VALIDLY CREATED BY CONGRESS AS AN ARTICLE III COURT

*A. Congress intended by the 1953 Act to repudiate, so far as constitutionally possible, this Court's interpretation in the Bakelite and Williams cases as to what power Congress exercised in establishing the Court of Claims, and to declare authoritatively that it acted under Article III*

Section 1 of the 1953 Act (Appendix A, *infra*, pp. 128–129) amended Section 171 of Title 28 of the United States Code (the Code section providing for the Court

of Claims, see Appendix A, *infra*, p. 114) by adding, after the words

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims

a new sentence, reading:

Such court is hereby declared to be a court established under article III of the Constitution of the United States.

1. The language of the amendment shows that its purpose was, not to *make* the Court of Claims an Article III court, but to declare that it *was* such a court. The aim was not to change the character of the court from a legislative court to one established under Article III, but to declare that it had in fact been established under that article. Congress formally and authoritatively declared, through an amendment of the organic act creating the court, that in bringing the court into being it had exercised its power under Article III to create inferior federal courts.

2. The legislative history of the measure shows that it was Congress's purpose to repudiate, so far as it constitutionally might, this Court's interpretation in the *Bakelite* and *Williams* cases of the power Congress exercised and intended to exercise in establishing the court, and to declare that it had exerted its power under the Judiciary Article to ordain and establish federal tribunals inferior to this Court.

a. The bill which became the 1953 Act was H.R. 1070, 83d Congress. The House Judiciary Committee,

in reporting it out, described the "principal purpose" of the bill as follows (H. Rept. 695, 83d Cong., 1st sess., p. 2):<sup>8</sup>

The principal purpose of this bill is to declare the United States Court of Claims to be a court established under article III of the Constitution. Subsequent to a long line of decisions which recognized the Court of Claims as such a constitutional court,<sup>9</sup> the United States Supreme Court held in 1933 that the Court of Claims was not organized under the provisions of article III, but rather was created by Congress as a so-called legislative court in the exercise of its constitutional power under article I to pay the debts of the United States. By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient. \* \* \*

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<sup>8</sup> Portions of this report are also quoted in our *Lurk* brief, No. 481, at pp. 55-56, since the legislative history of the Act of August 25, 1958, there considered (adding to the Code provision establishing the Court of Customs and Patent Appeals the same language which the 1953 Act added to 28 U.S.C. 171), shows that Congress sought to accomplish with respect to the Court of Customs and Patent Appeals, in 1958, the same objective which it sought to effect in 1953 for the Court of Claims.

<sup>9</sup> The decisions referred to were cited and quoted from at a later point in the report (p. 4). See *infra*, p. 30.

Referring to Section 1 of the bill—the section which added the declaratory language to the charter of the court—the report stated (p. 3) :

\* \* \* Need for this declaration arises from the decision of the Supreme Court in 1933 in the case of *Williams v. United States* (289 U.S. 553), which held that the Court of Claims was not one of the inferior courts established by Congress under article III of the Constitution, but rather was created by Congress as a "legislative court" in the exercise of congressional power, under article I, to pay the debts of the United States. Section 1 of the bill should remove any doubt that the Court of Claims is a constitutional court.

The report declared the committee's disagreement with the assumption of the *Williams* case (see *supra*, pp. 19-20, 28) that "Controversies to which the United States shall be a Party," as the phrase is used in Article III, do not include controversies to which the United States is a party *defendant*. It said (p. 3) :

Congress was possessed of two powers under which it might have created the Court of Claims, and it would seem appropriate for it to say which of the powers it was intending to exercise. The *Williams* case held that in the creation of the Court of Claims Congress was exercising the power granted by article I to pay the debts of the United States. On the other hand, article III provides that—

The judicial Power of the United States shall extend \* \* \* to Controversies to which the United States shall be a Party.

\* \* \*

The United States is a party in all cases in the Court of Claims. It would seem, therefore, that the Court of Claims exercises the judicial power thus defined in article III and is one of the inferior courts which Congress is empowered to create under that article.

After referring briefly to the legislative history of the 1855 Act under which the Court of Claims was created (see *infra*, pp. 37-49) and concluding that it "seem[ed] certain that Congress, when it established the Court of Claims in 185[5], intended to create a court under article III"<sup>10</sup> (p. 3), the committee pointed out that, until 1929, this Court itself had been of the view that the Court of Claims was an Article III court (pp. 3-4). Substantiating passages were quoted from several pre-1929 opinions (p. 4).<sup>11</sup>

"The first intimation that the Supreme Court had any thought of deviating from this unbroken line of cases," the report went on (p. 5), "was contained in *Ex parte Bakelite Corporation* (279 U.S. 438), decided in 1929, just 4 years after *Miles v. Graham*

<sup>10</sup> See, however, on this point, pp. 49-56, *infra*.

<sup>11</sup> These were: *United States v. Klein*, 13 Wall. 128, 145; *United States v. Union Pacific Railroad Co.*, 98 U.S. 569, 603-604; *United States v. Louisiana*, 123 U.S. 32, 35; *Minnesota v. Hitchcock*, 185 U.S. 373, 384, 386; *Kansas v. United States*, 204 U.S. 331, 342. In addition, the report cited this Court's decision in *Miles v. Graham*, 268 U.S. 501 (1925), holding the salary of a judge of the Court of Claims to be immune to taxation (because of the then prevailing rule that taxing judges' salaries was forbidden by the prohibition of Article III, Section 1, against diminishing their compensation during their continuance in office). As noted in the report (p. 4), the decision assumed that the Court of Claims was an Article III court. We discuss these cases *infra*, pp. 61-65.

[268 U.S. 501].”<sup>12</sup> Following a critique of the rationale of the *Bakelite dictum* relating to the Court of Claims, some further discussion of the *Williams* decision, and a reference to the fact that the Department of Justice, in the *Pope* case, had reversed the position it had taken as to the nature of the Court of Claims in the *Williams* case (*supra*, pp. 20-21), the report concluded its discussion of Section 1 of the bill by stating (p. 5) :

In view of this uncertainty and difference of opinion it would certainly seem proper for the body which created the Court of Claims to declare whether, in the creation of it, Congress intended to exercise article I or article III power.

The House report thus leaves no room for doubt that it was the purpose of the House bill (which became the 1953 Act) to declare that the Court of Claims then was, and historically had been, an Article III court—not to transform it into such a court. The bill was passed by the House without debate. 99 Cong. Rec. 8125-8126.

b. A companion Senate bill, S. 1349, was similar to the House bill except that, instead of adding the statement

Such court is hereby declared to be a court established under article III of the Constitution of the United States

to Section 171 of Title 28 as a separate sentence, it proposed to amend the section so as to make it read, in a single sentence:

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<sup>12</sup> See, as to *Miles v. Graham*, note 11, *supra*, p. 30.

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record *established under article III of the Constitution of the United States and known as the United States Court of Claims.*<sup>13</sup>

The report of the Senate Judiciary Committee which originally accompanied this bill (S. Rept. 261, 83d Cong., 1st sess.), in explaining the bill's purpose, stated in relevant part (p. 2) :

The United States Court of Claims, as it now exists, is a legislative court. This was decided in the case of *Williams v. United States* (289 U.S. 553). There are two classes of United States courts, one class being termed "constitutional courts" meaning those established under article III of the Constitution, and the other class being termed "legislative courts" being those not established under said article III of the Constitution. In the Williams case the Court ruled that Congress created the Court of Claims under the power granted by article I of the Constitution.

The fact that the Court of Claims is not a "constitutional court" raises many complications. Said court handles a class of cases which very properly should fall under the judicial power of the United States as provided in article III, which provides that such judicial power " \* \* \* shall extend \* \* \* to controversies to which the United States shall be a party." Every case filed in the Court of

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<sup>13</sup> See S. Rept. 261, 83d Cong., 1st sess., p. 3, on S. 1349. The italicized words were proposed to be added to the section by the Senate bill.

Claims is a case wherein the United States is a party defendant. There appears to be no doubt but that the Court of Claims could, therefore, have been created under said article III. The committee is of the opinion that it more properly should have been so created, and this bill accomplishes this end. This change in status of the court would have many far-reaching effects, not the least of which would permit the assignment by the Chief Justice of the United States of circuit and district judges to serve as judges of the Court of Claims when called upon so to do by the chief justice of the Court of Claims. There has been substantial doubt as to whether or not circuit and district judges could be assigned to the Court of Claims and a much more serious doubt as to whether judges of the Court of Claims could legally be assigned to either the district or circuit bench. All such doubt will be removed by the passage of this act.

A "corrected report" (S. Rept. 275, 83d Cong., 1st sess.) was later substituted for the original report. 99 Cong. Rec. 5020. The corrected report (p. 2) substituted for the sentence (in the original report)

The committee is of the opinion that it more properly should have been so created, and this bill accomplishes this end

the following:

The committee is of the opinion that Congress intended it to have been so created, and this bill accomplishes this end.

It is evident from the context, we believe, that the statement "The United States Court of Claims, as it

now exists, is a legislative court", appearing in both the original and corrected versions of the Senate report, meant only that the Court of Claims had been held to be such a tribunal by this Court in the *Williams* case, which the committee cited as authority for the proposition. The committee did not intend to suggest, we think, that it agreed with the *Williams* holding. On the contrary, the committee's substitution in the corrected report of the statement "The committee is of the opinion that Congress intended it to have been so created [i.e., under Article III]," for the statement "The committee is of the opinion that it more properly should have been so created," shows that the committee desired to express its disagreement with the *Williams* decision on this point.<sup>14</sup> The fact that both the original and corrected versions referred to a "change in status" which the Court of Claims would undergo if the bill became law is not

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<sup>14</sup> It is true that in subsequent reports on cognate bills—S. Rept. 2352, 83d Cong., 2d sess., p. 2, on S. 2975 (a bill introduced in the Eighty-third Congress to declare the Customs Court to be an Article III court, but which was passed over), S. Rept. 2353, 83d Cong., 2d sess., p. 2, on S. 3131 (a bill introduced in the same Congress to declare the Court of Customs and Patent Appeals to be an Article III court, but which was likewise passed over), and S. Rept. 1827, 84th Cong., 2d sess., p. 2, on S. 584 (the bill which became the Act of July 14, 1956, c. 589, § 1, 70 Stat. 532, declaring the Customs Court to be an Article III court)—the substance of the language of the original Senate report, *supra* ("The committee is of the opinion that it more properly should have been so created \* \* \*"), continued to be used. It would appear, in the light of the committee's action in changing this language in the manner indicated in the "corrected" report referred to above, that the committee's failure to make corresponding changes in the later reports was an oversight.

inconsistent with this conclusion. There would be a "change" from the holding of *Williams* that the court was a legislative court. For these reasons, the Senate report is, in our view, not essentially dissimilar from the House report, which as we have seen leaves no doubt as to the declaratory purpose of the legislation.

When the Senate bill came up for debate, Senator Gore requested that the House bill, H.R. 1070, be substituted for it. 99 Cong. Rec. 8943-8944. He explained that he thought the language of the Senate bill (see *supra*, pp. 31-32) was susceptible to the interpretation that Congress was creating a new court, whereas the House bill was not open to such an inference. *Id.*, 8943. Senator McCarran, the chairman of the Judiciary Committee, interposed no objection to the substitution of the House bill, which was thereupon passed. *Id.*, 8944. While some of the language used by Senators Gore and McCarran in their brief references to the two bills would suggest that the purpose of the bills was to "make" the Court of Claims an Article III court rather than to "declare" it to be one,<sup>15</sup> we think, again, that their remarks, when read in context, do not conflict with the essentially declaratory intent of the proposed legislation. In the light of the clear purpose of the legislation as reflected by the committee reports (par-

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<sup>15</sup> E.g., Senator Gore said that he had some doubts as to the "wisdom of making the Court of Claims an article III constitutional court" (99 Cong. Rec. 8943), and Senator McCarran remarked, in reply to an argument made by Senator Gore, that he was "only taking issue with the suggestion that we cannot make the United States Court of Claims an article III court" (*id.*, 8944).

ticularly the House report, *supra*, which accompanied the bill that actually became law) and the language of the Act itself, the Senators' references to the bills' "making" the Court of Claims a constitutional court involved no more, we think, than an imprecise use of language.<sup>16</sup>

c. The subsequent action of Congress in declaring the Customs Court and the Court of Customs and Patent Appeals to be courts established under Article III (in 1956 and 1958, respectively) further confirms the declaratory objective of the 1953 Act as to the Court of Claims. See our *Lurk* brief, pp. 58-60.

B. *Apart from the 1953 declaration, there exist strong historical grounds for holding that the Bakelite and Williams cases erred in ruling that the Court of Claims was not an Article III court*<sup>17</sup>

#### 1. CONGRESS INTENDED THE COURT OF CLAIMS TO BE AN ARTICLE III COURT

This Court has said that whether a court is legislative or constitutional does not depend upon "the intention of Congress." *Ex parte Bakelite*, 279 U.S. 438, 459. This means, we believe, only that Congress's characterization of a court as "legislative" or "constitutional" is not controlling. The Court did not say that it was irrelevant what power Congress consid-

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<sup>16</sup> Cf. the remarks of Senator Talmadge and Representative Keating, made with reference to the legislation which declared the Court of Customs and Patent Appeals to be an Article III tribunal, referred to in our *Lurk* brief, No. 481, at p. 60, note. 32.

<sup>17</sup> Substantial portions of the government's brief in *Pope v. United States*, 323 U.S. 1, No. 26, Oct. Term 1944, are repeated under this heading.

ered itself to be exercising; on the contrary, the same sentence of the *Bakelite* opinion declares that “the true test lies in the *power under which the court was created* and in the jurisdiction conferred” (emphasis added). At all events, the power which Congress intended to exercise is a highly relevant consideration in determining what power it did exercise in creating a court.

We review in some detail the relevant history of the Court of Claims. Although the court as originally constituted (in 1855) lacked the authority to render final judgments, its judges have always possessed life tenure—one of the hallmarks of an Article III tribunal—and the power to render final judgments was added at a relatively early date.<sup>18</sup> With the addition of the latter power, the court became a full-fledged Article III tribunal, hearing and determining “Controversies to which the United States shall be a Party” within the intendment of the Judiciary Article—as this Court, beginning in 1866, uniformly assumed and repeatedly declared for more than sixty years (*infra*, pp. 55–56, 61–65).

#### a. THE COURT OF CLAIMS AS ORIGINALLY CONSTITUTED

##### *i. The debates in Congress*

The middle of the nineteenth century saw mounting dissatisfaction with the treatment accorded claims against the United States. These were heard and passed on individually by Congress and disposed of by special act. The pressure of business resulted in

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<sup>18</sup> By amendments enacted in 1863 and 1866 (see *infra*, pp. 49–56).

many claims being neglected, while those accorded satisfaction obtained it more often through influence than merit.

On December 18, 1854, Senator Brodhead reported from the Senate Committee on Claims a bill "to establish a board of commissioners for the examination and adjustment of private claims." Cong. Globe (33d Cong., 2d sess.), vol. 30, p. 70. The bill proposed the appointment of a board of three commissioners, to whom all petitions to Congress asking relief on account of any claim against the United States would be referred. *Id.*, p. 71. The board was to be "in the nature of a judicial tribunal," with power to take testimony on behalf of the government, but its decisions were not to be final. *Ibid.* It was to "get at and report the facts of each case," so as to enable Congress "to render speedy justice to honest claimants." *Ibid.*<sup>19</sup>

In the course of extensive debates (*id.*, pp. 71-74, 105-114), it became apparent that a majority of the Senate desired a tribunal of greater dignity than that proposed by Senator Brodhead. While agreeing that the decisions of the tribunal should not be final, Senator Hunter thought that it should be a "court" (rather than a "board"), staffed by "judges," who would "hold their office as judges do under the Constitution of the United States," that its sessions and opinions should

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<sup>19</sup> Senator Brodhead expressed doubt whether Congress had the power under the Constitution to waive sovereign immunity and to authorize suit against the government either in "law or equity", and stated that the bill represented a compromise between enlarging the powers of executive officers and expanding those of the judiciary. *Id.*, p. 70.

be public, that records be kept, counsel permitted, the government represented by a regular attorney, and the rules of evidence followed. *Id.*, p. 71. Senator Clayton agreed that the tribunal should be a court, saying (*id.*, p. 72) :

These commissioners ought to be independent. If they are not judges nominally, they are so in fact, and ought to have that best of all qualities pertaining to a judge—perfect independence. I think it was in the convention of Virginia that John Marshall said, that of all the evils that could be inflicted upon a sinning people by an angry Heaven, a dependent judiciary was the worst. This is a court; call it what you please. I wish it to be substantially a court. I do not care for the name, whether you term them commissioners or judges; but I wish them to be independent. Now, my friend has provided in the bill that these commissioners shall be appointed by the President, by and with the advice and consent of the Senate, and "shall hold their office until the time appointed for the expiration of this act, unless sooner removed by the President." I trust the words, "unless sooner removed by the President," will be stricken from the bill. I do not wish these commissioners to sit in this high tribunal, liable, at any moment, to be dismissed by the President or anybody else. I do not wish the President himself, whoever he may be, to be liable, as he will be, constantly, to the imputation of controlling and governing the decisions of this tribunal. For the sake of the President, for the sake of the character of the tribunal, for the sake of

perfect justice, I ask that the tribunal may be in fact perfectly independent.

Senator Pettit urged that claims be referred to "the judicial tribunals of the country" for trial in the same manner as suits between private individuals, accurately prophesying that the establishment of a tribunal without power to enter final judgment would not relieve the pressure on Congress. *Id.*, pp. 72-73. Senator Jones thought that "there is but one safe mode of doing it, and that is to establish a court of claims—an independent judiciary, upon the same principle as the Supreme Court." *Id.*, p. 74.

The matter was referred to a select committee (*id.*, p. 74), which reported a bill differing in several important respects from the original one. *Id.*, pp. 105-106. In place of a board of three commissioners to hold office at the pleasure of the President, the new bill provided for a "Court of Claims" of three judges holding office during good behavior. Its sessions were to be public and records kept. It was given the same subpoena power as the federal district courts (a power not given the board proposed by the earlier bill). However, the decisions of the court, like those of the board, were to be advisory only, and were to be reported to Congress together with the facts found and the testimony taken. Where the decision was favorable to the claimant, a bill designed to effectuate the decision was to accompany the report. *Ibid.*

Senator Weller proposed an amendment striking the word "court" wherever it appeared in the bill and substituting the words "board of commissioners." *Id.*,

p. 107. He gave the following reasons for the proposed amendment (*ibid.*):

Under the Constitution of the United States, if there be a court established, the judges of that court are to be appointed during good behavior. The only power which is given to us on that subject is by the first section of the third article of the Constitution of the United States, which provides that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior." In order to avoid the difficulty which is presented to my mind, I am compelled to move to change the character of this tribunal from a court to that of a board of commissioners; and I apprehend that then, under the provisions of the Constitution, it would be perfectly competent for the law-making power of this Government to limit the period for which the commissioners should hold their offices. It may well be doubted whether this bill creates a "court" within the meaning of the provision of the Constitution to which I have referred; but, to avoid all controversies which might arise on this subject, I deem it proper to move the amendment.

The proposal provoked considerable discussion and elicited a variety of opinions as to the character of the tribunal being created. Senator Hunter, a member of the select committee, opposed the amendment, stating that it was of the greatest importance that the members of the body enjoy tenure during good behavior and be as independent of the appointing power "as the Constitution has made the judges of the United States," in order that the actions of the

tribunal should be "sound, and just, and pure, and impartial." *Id.*, pp. 108-109.

Senator Pratt expressed the view that, regardless of what the tribunal was called, it would be exercising judicial power and that, consequently, the Constitution required its judges to have tenure during good behavior. *Id.*, p. 110. Senator Weller disagreed on the ground that the court was to be merely "a court of inquiry—a mere tribunal to take testimony for the final action of Congress."<sup>20</sup> *Ibid.*

Senator Clayton, another member of the select committee, agreed with Senator Pratt, pointing out that the judicial power of the United States, as defined by the Constitution, extends to "controversies to which the United States shall be a party," and maintaining that "every one of these private claims on the Government is a controversy to which the United States necessarily is a party." *Id.*, p. 111. Quoting the clause of Article III, Section 1, requiring that the judges both of this Court and of the inferior courts established under that article hold office during good behavior, he said (*ibid.*):

Sir, the spirit, to say nothing of the letter, of  
the Constitution undoubtedly requires that those

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<sup>20</sup> "The Congress of the United States," the Senator further stated, "undoubtedly has power to appoint commissioners; and what is the provision of this bill but the organization of a board of commissioners to ascertain \* \* \* facts connected with claims against this Government. There is not a word in the bill which makes the opinion of these judges the judgment of a court. \* \* \* It is to be a mere tribunal organized for the purpose of ascertaining facts and taking testimony, and submitting that testimony to the legislative branch of the Government, where the case can finally be disposed of." *Id.*, p. 110.

who undertake to decide upon these claims should be judges. They should be independent. No man can assign a reason why they should not be, to all intents and purposes, as independent as any other judges existing under the Government. It was, therefore, sir, with a view to the provisions of the Constitution itself, that the committee felt themselves bound to make the report of a bill establishing a court—the judges of which should be as independent as any judge of the Supreme Court of the United States—to decide these cases.

Senator Chase, whose views are of particular interest because he was a member of the Court which later was to decide *Gordon v. United States*, 2 Wall. 561,<sup>21</sup> said (*id.*, p. 112) :

I cannot regard this delegation of power to these officers as a delegation, in any sense, of judicial authority—judicial authority, I mean, as prescribed in the Constitution of the United States. Judicial authority implies power to determine finally upon cases submitted to it. No tribunal can be a court in the proper sense of the word, unless it has the power to determine the law in regard to the particular controversies submitted to it. There may be an appeal from it, but if not appealed from, its judgment is final.

Senator Stuart was of the view that the tribunal to be established by the bill was (*id.*, p. 113)—

a court under the provisions of the Constitution, and that the Constitution prescribes the tenure of office.

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<sup>21</sup> See *infra*, pp. 52–54, including note 26.

He did not think that merely changing the names of the members of the body from "judges" to "commissioners" would affect its status, though he agreed that a bill "might be framed establishing a commission which would not be a judicial tribunal within the meaning of the Constitution." *Ibid.* Addressing himself to the argument that the court proposed by the bill could not be considered a judicial tribunal because it would not have "the power to enforce its judgments," he noted that, under the Constitution, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,"<sup>22</sup> from which it followed, he said, that (*ibid.*)—

there is and can be no judicial tribunal which could issue an execution to satisfy a judgment out of the Treasury of the United States, so that test in this instance must fail.

Senator Douglas, who stated that he concurred in Senator Stuart's views, added that it was only because the bill reported by the select committee raised the body as originally proposed "to the dignity of a court of the United States" that it would receive his support. He continued (*ibid.*):

I think that if we do establish a court of claims, possessed and endowed with all the prerogatives and privileges of a court, to compel the attendance of witnesses, where there can be a fair and impartial investigation, and an attorney to attend to the interests of the United States, so that we can have an adjudication of the merits of each claim, it will bring a weight of authority into the Senate and into the House

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<sup>22</sup> Article I, Section 9, clause 7.

of Representatives which would be binding on our judgments in all cases where the contrary could not be made clearly to appear. If we were to change the name of the tribunal, although I admit, a name is not always of importance, I should attach importance to it in this case. The fact of calling this tribunal a board of commissioners would imply that it was only to take the place of a committee, and to report facts. Now, I want an adjudication which I should deem binding upon us, and on which I could vote to confirm the verdict or judgment of the court without inquiry, and to appropriate the money because they had found it to be due. I want an adjudication in which I could put the same credence that I would give to a decision of the Supreme Court of the United States, so that when their report is made to us, unless some extraordinary cause appeared to the contrary, we should appropriate at once the money, or, if they reported adversely, decide against the claim.

After stating that he desired, for these reasons, that the court be one "with the first men of the country upon the bench, and the first lawyer of the country for the attorney of the United States, before the court," and adverting to the requirement of Article III that judges of courts of the United States hold office during good behavior (*id.*, pp. 113-114), he concluded (*id.*, p. 114):

Under that view, I shall vote to create a court of claims with the authority of a court, and then give to its members that tenure which the Constitution compels us to give in that event.

With this diversity of opinion before it, the Senate rejected the proposed amendment by a vote of 24 to 16 (thus sustaining the position of those who wished the new tribunal to be a "court"), and passed the bill. *Id.*, p. 114.

It will be noted that at the time of these debates (1854) this Court's decision in *American Insurance Co. v. Canter*, 1 Pet. 511 (1828)—in which the distinction between a constitutional court and a legislative court had its origin (see note 26, pp. 51-52, of our brief in the *Lurk* case, No. 481)—was already 26 years old, so that the concept of a "legislative court," exercising judicial power derived from a source in the Constitution other than the Judiciary Article (such as a territorial court, the kind involved in *American Insurance Co.*), could not have been unfamiliar to the Senators who discussed the merits of the bill—men obviously learned in the law. It is significant that their discussion posed the alternatives of a judicial tribunal or a board of commissioners. The possibility that they were creating a "legislative court" occurred to no one. It was uniformly assumed that if the Court of Claims was to be established as a court, it would be one of the inferior courts authorized by Article III.

The House of Representatives passed the bill as approved by the Senate (Cong. Globe (33d Cong., 2d sess.), vol. 30, p. 902), and it became law on February 24, 1855. 10 Stat. 612.

#### *ii. The original Act of 1855*

The original act creating the Court of Claims (Act of February 24, 1855, c. 122, 10 Stat. 612) is set forth

in full in Appendix A, *infra*, pp. 117-122. Its chief provisions, so far as relevant, may be summarized as follows:

Section 1 established "a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behaviour." The court was to (*ibid.*)—

hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress.

A solicitor, appointed by the President, by and with the advice and consent of the Senate, was to represent the government before the court (§ 2). He was to prepare and argue all cases on behalf of the government, cause testimony to be taken when necessary to secure the government's interest, prepare forms, file interrogatories, and superintend the taking of testimony in a manner to be prescribed by the court (*ibid.*).

The court was given authority to establish rules and regulations for its government; to appoint commissioners to take testimony to be used in the investigation of claims; to issue commissions for the taking of such testimony (at either the claimant's or the government's instance); and to issue subpoenas requiring the attendance of witnesses with the same

force as if issued by a district court of the United States (§ 3). False swearing before the court, or before any person or persons authorized by the court to take testimony, was punishable as perjury (§ 6).

At the commencement of each session of Congress, and of each month during the session, the court was to report to Congress the cases in which it had finally acted, stating in each the material facts which it found established by the evidence, with its opinion in the case and the reasons for its decision (§ 7). The testimony in each case was to accompany the report. If one of the judges dissented, his views were to be appended to the majority's report, which, together with the briefs filed by the parties, were to be printed as public documents. The court was to (*ibid.*)—

prepare a bill or bills in those cases which shall have received the favorable decision thereof, in such form as, if enacted, will carry the same into effect.

Two or more cases might be embraced in the same bill if the amount proposed to be allowed in each was less than \$1,000 (*ibid.*).

The court's reports in cases in which it had acted favorably to the claimants, and the accompanying bills, if not finally acted upon by Congress during the session in which received, were to be continued from session to session, and from Congress to Congress, until finally disposed of (§ 8). Claims adversely reported upon by the court were to be placed on the congressional calendar; if the decision was thereafter confirmed by Congress, it was to be conclusive, and the court was prohibited from giving further con-

sideration to the claim unless reasons were presented to it which would warrant the granting of a new trial in suits between individuals at law or in chancery (§ 9).

**b. THE 1863 AND 1866 AMENDMENTS GIVING FINALITY TO THE COURT'S JUDGMENTS**

It soon became apparent, however, that the congressional objective in establishing the court was being defeated by the lack of finality in its decisions. Matters considered by the court were reviewed by Congress in the same detail and with as little expedition as matters in which that tribunal had not acted. Consequently, claimants were loath to invoke the services of the court, and the backlog of unconsidered claims grew in both houses of Congress. President Lincoln, accordingly, in his message to Congress of December 3, 1861, urged that the court be empowered to render final judgments. He said (Cong. Globe, 37th Cong., 2d sess., Appendix, p. 2) :

It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. *The investigation and adjudication of claims, in their nature belong to the judicial department;* besides, it is apparent that the attention of Congress will be more than usually engaged, for some time to come, with great national questions. It was intended by the organization of

the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final.

Fully aware of the delicacy, not to say the danger, of the subject, I commend to your careful consideration whether this power of making judgments final may not properly be given to the court, reserving the right of appeal on questions of law to the Supreme Court, with such other provisions as experience may have shown to be necessary. [Emphasis added.]

### *i. The 1863 Act*

So prompted, Congress passed the Act of March 3, 1863, c. 92, 12 Stat. 765, the relevant provisions of which are set forth in Appendix A, *infra*, pp. 122-125. The principal purpose of the Act—an objective which, however, this Court was to hold in *Gordon v. United States*, 2 Wall. 561, 117 U.S. 697, was not achieved (*infra*, pp. 52-54)—was to give finality to the court's judgments, subject to a limited right of review by this Court (§§ 3, 5, 7).<sup>23</sup> The Act, in addition, increased

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<sup>23</sup> Appeal could be had by either party where the amount in controversy exceeded \$3,000; in addition, if a judgment involved a constitutional question, or "affect[ed] a class of cases," or "furnish[ed] a precedent for the future action of any executive department of the Government in the adjustment of such class of cases," the government was granted the right of appeal without regard to the amount in controversy (§ 5).

the size of the court from three to five judges (§ 1)<sup>24</sup> and gave it the power to hear and determine, in addition to claims against the government, setoffs and counterclaims by the government (§ 3). The 14th and final section provided that (Appendix A, *infra*, p. 125)—

no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

This provision had been proposed as an amendment to the bill during the Senate debates by Senator Hale, who had strongly opposed giving finality to the court's judgments (Cong. Globe, 37th Cong. 3d sess., pp. 270-271, 310, 371, 372, 416), and was accepted by the sponsor of the bill, Senator Trumbull, and the Senate virtually without discussion (*id.*, p. 426). See note 27, *infra*, p. 55.

In the course of the debates, there were several references to making sure that the court was a "court of the United States", an "inferior tribunal", a true "court", a "court sitting during life", etc. See Cong. Globe, 37th Cong., 2d sess., pp. 1672, 1673, 1674, 1675, 1676; Cong. Globe, 37th Cong., 3d sess., pp. 303, 399, 419. A suggestion in the House that the judges be removable at the pleasure of the President was not pressed after it was pointed out that under

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<sup>24</sup> One of the five was to be designated the "chief justice" by the President (§ 1).

the Constitution judges hold tenure during good behavior.<sup>25</sup>

Because of Section 14 of the 1863 Act, *supra*, this Court, in *Gordon v. United States*, 2 Wall. 561, dismissed an appeal from a judgment of the Court of Claims for want of jurisdiction. According to the opinion prepared for the Court by Chief Justice Taney<sup>26</sup> (117 U.S. 697, 698-699; see also *United*

<sup>25</sup> Congressman Hickman proposed that the judges be removable (Cong. Globe, 37th Cong., 2d sess., p. 1675), and then had the following colloquy with Congressman Shellabarger (*id.*, p. 1675) :

MR. SHELLABARGER: I wish to make an inquiry of the learned chairman of the Judiciary Committee. I understand him to take the ground—and I suppose it is the true one—that this is intended to be a court within the meaning of the Constitution. If that be so, then I wish to make an inquiry in relation to a point to which he has just alluded, and which is an important one, and which he proposes to bring before the House in the shape of an amendment. My inquiry is whether it is competent to provide that the judges of any court shall be removable at the pleasure of the Executive—whether their tenure is not during good behavior?

MR. HICKMAN: Well, sir, the objection which has been raised by the gentleman from Ohio proves conclusively that the present is no court. The suggestion which he has made proves that conclusively; and if the amendment which I have suggested is objectionable—and it may be so; it occurred to me on the spur of the moment—of course I do not insist upon it. It strikes me that it may be objectionable.

<sup>26</sup> Chief Justice Taney placed his draft opinion in the hands of the clerk, during the vacation of the Court in 1864, to be delivered to the members of the Court on their reassembling in December of that year, but the Chief Justice died before the justices met. The clerk complied with his request, however, and (as explained in the note preceding the opinion as re-

*States v. Jones*, 119 U.S. 477, 478), the basis of the decision was that under the 1863 Act, as a consequence of Section 14,—

Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment; and whether it is paid or not, does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury, and of Congress.

The Court said that there was no objection to a provision such as Section 14 so far as the Court of Claims was concerned, since Congress might (117 U.S. at 699)—

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ported in 117 U.S. 697) "It is the recollection of the surviving members of the court, that this paper was carefully considered by the members of the court in reaching the conclusion reported in 2 Wall. 561; and it was proposed to make it the basis of the opinion, which, it appears by the report of the case, was to be subsequently prepared. The paper was not restored to the custody of the clerk, nor was the proposed opinion ever prepared. At the suggestion of the surviving members of the court, the reporter made efforts to find the missing paper, and, having succeeded in doing so, now prints it with their assent."

The actual judgment of the Court (from which two justices dissented (see 2 Wall. 561)), was announced by Chief Justice Chase (see *United States v. Jones*, 119 U.S. 477, 478).

undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the Executive Departments. In this respect the authority of the Court of Claims is like to that of an Auditor or Comptroller \* \* \*.

But, said the Court (117 U.S. at 704)—

it is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless *it was made by an inferior court, exercising independently the judicial power granted to the United States.* It is only from such judicial decisions that appellate power is given to the Supreme Court. [Emphasis added.]

It would appear that the necessary implication of the language we have italicized is that when Section 14 was repealed and this Court thereafter took appeals without question from judgments of the Court of Claims, it must have been on the assumption that the Court of Claims, in rendering such judgments, was exercising the judicial power of the United States—in other words, that it was an Article III tribunal.

#### *ii. The repeal of Section 14 of the 1863 Act by the Act of 1866*

Shortly following the *Gordon* decision, Section 14 of the 1863 Act was repealed in order to remove the obstacle to the exercise of appellate jurisdiction

by this Court which the Court had declared it to be. Act of March 17, 1866, c. 19, § 1, 14 Stat. 9; see Cong. Globe, 39th Cong., 1st sess., p. 770.<sup>27</sup> This Court thereafter took appeals without question from the judgments of the Court of Claims. *De Groot v. United States*, 5 Wall. 419 (1866); *United States v. Alire*, 6 Wall. 573; *United States v. O'Grady*, 22 Wall. 641; *United States v. Jones*, 119 U.S. 477. The previous refusal to accept jurisdiction was explained as based upon the power of the Secretary of the Treasury under the prior law to examine and revise the judgments of the Court of Claims, the Court observing that the removal of that power made the judgments final and so reviewable by this Court. *United States v. O'Grady*, 22 Wall. 641, 647; *United States v. Jones*, 119 U.S. 477, 478-479. Thus, in *United States v. O'Grady*, the Court said (22 Wall. at 647) :

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<sup>27</sup> Senator Trumbull, the Chairman of the Judiciary Committee, who had sponsored the bill which became the 1863 Act, and who had accepted Senator Hale's amendment from the floor adding Section 14 (see *supra*, p. 51) in the belief that the amendment would not affect the bill's purpose of giving finality to the Court of Claims' judgments (see Cong. Globe, 37th Cong., 3d sess., p. 426), explained, in requesting the repeal of the section in 1866, that it had "been the custom of the Treasury to make an estimate to pay the judgments of the Court of Claims each year, and out of that estimate the judgments are paid"; that he, accordingly, had not anticipated that Section 14 might be construed as giving the Secretary of the Treasury revisory authority over the court's judgments, but that, since this Court had held that the section did have that effect, it was necessary to repeal the section in order to give the 1863 Act its intended effect. Cong. Globe, 39th Cong., 1st sess., p. 770.

Subsequently [to *Gordon v. United States*, *supra*] Congress repealed the provision conferring that [revisory] authority upon the Secretary of the Treasury, and since that time no doubt has been entertained that it is proper that the Supreme Court should exercise jurisdiction of appeals in such cases.

Thus, insofar as Congress was able to do so, it committed the determination of claims against the United States to the judiciary, and established the Court of Claims as a national tribunal for the hearing and decision of such claims, free from all revisory authority on the part of the executive and legislative branches.<sup>28</sup> It is clear that this Court, with the repeal in 1866 of Section 14, assumed that the Court of Claims commenced to exercise the judicial power of the United States in the full sense of the term as used in Article III, and that it was from that date an Article III tribunal. As we shall show, moreover (*infra*, pp. 61–65), this Court on repeated occasions between 1866 and 1929 so declared.

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<sup>28</sup> It is true that Congress, beginning in 1883 (some seventeen years after giving finality to the judgments of the Court of Claims), gave the court certain functions of an advisory nature in addition to its regular judicial duties—its so-called congressional and departmental reference jurisdiction. For the nature of this jurisdiction, see *infra*, pp. 102–103. The congressional reference jurisdiction is still retained by the court. 28 U.S.C. 1492–2509 (Appendix A, *infra*, pp. 116–117). The departmental reference functions were repealed in 1953 (Act of July 28, 1953, c. 253, § 8, 67 Stat. 226). At pp. 102–107, *infra*, we argue that the conferring of these special functions of a non-judicial character did not affect the court's Article III status and was consistent with that status.

c. THE TUCKER ACT'S VESTING OF CONCURRENT JURISDICTION OF CLAIMS AGAINST THE UNITED STATES IN THE REGULAR FEDERAL COURTS

A further significant indication of Congress's understanding and intent with respect to the character of the Court of Claims is to be found in the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505.<sup>29</sup> Section 1 substantially reenacted, as follows, the basic jurisdiction of the Court of Claims (Appendix A, *infra*, pp. 126-127) :

The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable [with certain exceptions, not here material].

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court \* \* \*.

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<sup>29</sup> The pertinent provisions of this Act are set forth in Appendix A, *infra*, pp. 126-127.

It is to be noted, in the first place, that this basic redefinition by Congress of the Court of Claims' powers and functions occurred only nine years after this Court, in *United States v. Union Pacific Railroad Co.*, 98 U.S. 569, 603 (see *infra*, p. 63), had expressly declared that the Court of Claims had been created under Article III and exercised "a defined portion of the judicial power" encompassed by that article. In the light of the established rule that Congress, in reenacting a statute, is presumed to have adopted the construction given to the same language in the prior statute (see, *e.g.*, *Shapiro v. United States*, 335 U.S. 1, 16, and cases cited), it would seem probable that Congress, in thus reenacting and redefining the powers of the Court of Claims, supposed that it was vesting those powers in an Article III tribunal.<sup>30</sup>

That conclusion is strengthened, moreover, by the highly significant fact that the same Act vested in the regular federal courts (district and circuit) concurrent jurisdiction with the Court of Claims over claims against the United States as above defined. Section 2 provided that (Appendix A, *infra*, p. 127)—

the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the

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<sup>30</sup> Cf. our argument, *infra*, pp. 100-102, that if the Court of Claims had not previously been constituted an Article III Court, it was so constituted upon the reenactment of the provisions providing for the court in the Judicial Code of 1911.

circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. \* \* \*<sup>31</sup>

The Article III origin and status of the district and circuit courts have, of course, never been questioned. It is to be noted, furthermore, that while ceilings as to the amount in controversy were imposed on the claims cognizable by the regular federal courts, the jurisdiction of the Court of Claims was to continue in the future (as it had been in the past) wholly unlimited in this respect. It would be anomalous to conclude that the Court of Claims, to which Congress entrusted the determination of claims against the government without limit as to amount, was, or was understood by Congress to be, a tribunal of lesser status, dignity, or judicial independence than the ordinary federal tribunals, whose authority to hear such claims was rigidly circumscribed. The Tucker Act thus affords further and striking evidence of the congressional understanding as to the status and character of the Court of Claims as a constitutional court.

**d. CONGRESS'S TREATMENT OF THE COURT OF CLAIMS AS PART OF THE REGULAR FEDERAL JUDICIARY IN THE JUDICIAL CODE OF 1911**

When the Judicial Code was enacted in 1911 (Act of March 3, 1911, c. 231, 36 Stat. 1087), the provisions

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<sup>31</sup> This provision (as later amended) is now contained in 28 U.S.C. 1346(a)(2) and (c) (Appendix A, *infra*, pp. 114-115). The \$10,000 limitation placed on the jurisdiction of the former circuit courts now applies to the district courts.

pertaining to the establishment, powers, and jurisdiction of the Court of Claims were transferred to the Code (with amendments not here pertinent) and codified as Chapter Seven (§§ 136–187, 36 Stat. 1135–1143) together with the provisions relating to the district courts (Chapters One through Five), the circuit courts of appeals (Chapter Six), the Court of Customs Appeals<sup>32</sup> (Chapter Eight), the former Commerce Court<sup>33</sup> (Chapter Nine), and this Court (Chapter Ten). 36 Stat. 1087–1135, 1143–1160. Congress evidenced its understanding that the Court of Claims was an Article III court by treating it as an integral part of the federal judicial establishment.

**e. THE AUTHORITY OF THE COURT OF CLAIMS TO HEAR APPEALS FROM JUDGMENTS OF THE DISTRICT COURTS UNDER THE FEDERAL TORT CLAIMS ACT**

More recently, Congress, in the Federal Tort Claims Act of 1946, gave the Court of Claims appellate jurisdiction (provided the notice of appeal had affixed to it the written consent of each appellee) to review any final judgment of a district court in a tort claim proceeding brought against the government under the Act (Act of August 2, 1946, c. 753, Title IV, § 412(a)(2), 60 Stat. 842, 844 (Appendix A, *infra*, p. 128)).<sup>34</sup> This

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<sup>32</sup> For our arguments that the Court of Customs Appeals (now the Court of Customs and Patent Appeals) has always been an Article III court, see our *Lurk* brief, No. 481, pp. 51–113.

<sup>33</sup> The Commerce Court, created by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539, and abolished three years later by the Act of October 22, 1913, c. 32, § 1, 38 Stat. 208, 219, was certainly an Article III court. See our *Lurk* brief, pp. 75–76, note 48.

<sup>34</sup> This authority, still possessed by the Court of Claims, is now contained in 28 U.S.C. 1504 (Appendix A, *infra*, p. 116). It does not appear to have been exercised.

jurisdiction of the Court of Claims was made concurrent with that of the courts of appeals (*id.*, § 412(a) (1) (Appendix A, *infra*, p. 128)). Since the courts of appeals and district courts are unquestionably of Article III status, the effect of these provisions was to give to the Court of Claims the power to review judgments of the ordinary Article III trial courts—concurrent with that possessed by the ordinary Article III appellate courts.

2. FROM 1866 TO 1929 THIS COURT UNIFORMLY ASSUMED,  
AND REPEATEDLY DECLARED, THE COURT OF CLAIMS TO  
BE AN ARTICLE III TRIBUNAL

The acceptance by this Court, beginning in 1866 (see cases cited *supra*, p. 55), of appeals from the Court of Claims, viewed in the light of Chief Justice Taney's opinion in the *Gordon* case (*supra*, pp. 52-54), unmistakably manifests the assumption by this Court that the "judicial power of the United States," defined in Article III, extends to the determination of claims against the United States. It also shows that the Court of Claims, which after 1866 was exercising such judicial power, was no longer considered by this Court to be a body comparable to an "Auditor or Comptroller" (as it was described in the *Gordon* case) but an "inferior Court" created under Article III, from whose decisions alone, according to the *Gordon* opinion, appeals would lie to this Court.

This assumption has by no means been at all times tacit. The Court in the years between 1866 and 1929 repeatedly and explicitly declared that the Court of Claims was an Article III tribunal, engaged in exer-

cising the judicial power vested by Congress in the courts created by or under that article.

In *United States v. Klein*, 13 Wall. 128 (1871), the Court invalidated an act of Congress which had sought to impose a rule of decision on the Court in hearing appeals from the Court of Claims. The Court predicated its decision on the ground that the statute was an attempted legislative encroachment upon the judicial power vested in it by Article III. In basing its holding on this ground, the Court clearly indicated that it considered its appellate jurisdiction over the Court of Claims to be within the ambit of the Judiciary Article. But the Court was more explicit. Observing that “[o]riginally [the Court of Claims] was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress” (13 Wall. at 144), the Court went on to say (at 144–145) :

In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. This court being of opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. Since then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.

The Court of Claims is thus constituted one of those inferior courts which Congress author-

izes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court. [Emphasis added.]

There can be no doubt that the "inferior courts" to which the Court referred were those "inferior Courts" which Article III, Section 1, gives to Congress the authority from time to time to ordain and establish.

In *United States v. Union Pacific Railroad Co.*, 98 U.S. 569, 603 (1878), the Court was even more explicit:

Congress has, under this authority [Article III], created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution. \* \* \*

\*       \*       \*       \*       \*

It would have been competent for Congress to organize a judicial system \* \* \* [consisting of] a court or courts \* \* \* with authority to exercise \* \* \* jurisdiction throughout the limits of the Federal government. This has been done in reference to the Court of Claims. \* \* \*

In *United States v. Louisiana*, 123 U.S. 32 (1887), the Court held that the Court of Claims had jurisdiction of an action by a State against the United States on a money claim arising under an act of Congress. Observing that the judicial power of the United States as defined in Article III extends to controversies to which the United States is a party, the Court declared (at 35):

The action before us, being one in which the United States have consented to be sued, falls

within those designated, to which the judicial power extends \* \* \*.

This clearly recognized not only that "Controversies to which the United States shall be a Party", as used in Article III, embrace suits against the government (where consent to suit has been given), but that the Court of Claims, whose ordinary subject matter jurisdiction consisted of just such suits, was a tribunal which derived its authority from that article.

The same point was articulated even more forcefully in *Minnesota v. Hitchcock*, 185 U.S. 373, 384, 386 (1902), where the Court said:

This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. \* \* \*

\* \* \* \* \*

While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. *Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition.*

[Emphasis added.]

To the same effect, see *Kansas v. United States*, 204 U.S. 331, 342 (1907); and cf. *Wallace v. Adams*, 204 U.S. 415, 423 (1907).

And as recently as 1925, four years before the *Bakelite* decision (in which the first contrary in-

timation appeared), the Court decided a case whose necessary premise was that the Court of Claims was an Article III tribunal. *Miles v. Graham*, 268 U.S. 501. It was there held—under the former rule, that taxing a judge's compensation diminished it within the sense of the Article III prohibition—that the salary of a judge of the Court of Claims was tax-exempt. So far as appears, the assumption that the Court of Claims derived its existence and authority from the Judiciary Article was questioned by no one.<sup>35</sup>

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<sup>35</sup> There is no indication that the dissent of Mr. Justice Brandeis (without opinion) had any relation to the nature of the Court of Claims. Presumably his dissent in the *Miles* case as in *Evans v. Gore*, 253 U.S. 245, 264–267 (which laid down the general rule as to the non-taxable status of judges' compensation), was based on the broader ground that a non-discriminatory tax on a judge's pay does not affect a diminution within the meaning of Article III.

Any doubt that Article III was uniformly assumed by this Court (prior to *Williams v. United States*, 289 U.S. 553, 571–578) to be the source of the judicial power exercised in determining claims against the United States was removed by the fairly recent use, prior to *Williams*, made by the Court of the *Gordon* case (*supra*, pp. 52–54) and two other early decisions involving claims against the government (to be discussed *infra*, pp. 87–90), *Hayburn's Case*, 2 Dall. 409, and *United States v. Ferreira*, 13 How. 40. These decisions, cited as judicial interpretations of the content of the "judicial power of the United States" vested in the inferior courts by Article III, are among the standard authorities for the principle that such courts may not take jurisdiction unless there is presented a "case" or "controversy" within the meaning of Article III, Section 2. See, e.g., *Tuton v. United States*, 270 U.S. 568, 576 (1926); *Willing v. Chicago Auditorium*, 277 U.S. 274, 289 (1928). Unless claims against the United States are covered by Article III, these older cases, involving such claims, would have been inapposite.

3. *EX PARTE BAKELITE* (1929) WILLIAMS v. UNITED  
STATES (1933)

a. In 1929, it was suggested for the first time that Article III was not the source of the judicial power exercised by the Court of Claims. *Ex parte Bakelite Corporation*, 279 U.S. 438, held that the Court of Customs and Patent Appeals was a "legislative court" created by Congress under its Article I power to lay and collect duties on imports (Article I, Section 8, clause 1); that it derived none of its authority from Article III; and that therefore it could take jurisdiction of an appeal from findings of the Tariff Commission in a proceeding under the Tariff Act of 1922, even though, because the findings were allegedly advisory to the President, the proceeding might not have involved a "case" or "controversy" under Article III, Section 2. In reaching that conclusion, this Court included in the category of legislative courts not only the territorial courts and those for the District of Columbia—created, it was said, pursuant to the plenary power over these areas vested in Congress by Article IV, Section 3 and Article I, Section 8, clause 17—but also a class of "special tribunals" created by Congress (279 U.S. at 451)—

to examine and determine various matters arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.

In this category the Court placed the Court of Claims (at 452):

Conspicuous among such matters are claims against the United States. These may arise

in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.

Disapproving the *dictum* in *United States v. Union Pacific Railroad Co.*, 98 U.S. 569, 603 ( *supra*, p. 63), that the Court of Claims was a constitutional court, and the assumption to that effect (see *supra*, pp. 64-65) underlying the holding in *Miles v. Graham*, 268 U.S. 501, the Court stated that the Court of Claims, like the courts of the District of Columbia, is not a constitutional court (279 U.S. at 452-455), and declared that the judicial power exercised by it is "prescribed by Congress independently of section 2 of Article III" (at 449). The Court further observed that "Congress always has treated" the Court of Claims as having the status of a legislative court (at 454)—a

statement which we submit would be difficult to reconcile with the relevant history (see *supra*, pp. 36–60).

To support its characterization of the Court of Claims as a legislative court, the *Bakelite* opinion cited *Gordon v. United States*, 2 Wall. 561, 117 U.S. 697, which held (see *supra*, pp. 52–54) that judgments of the Court of Claims could not be appealed to this Court when they were subject to revision by the Secretary of the Treasury, and *In re Sanborn*, 148 U.S. 222, which held that an appeal to this Court did not lie from an advisory opinion rendered by the Court of Claims to the Secretary of the Interior.<sup>36</sup> 279 U.S. at 454–455. But the *Gordon* case, as we have seen, was followed by an amendment eliminating the executive revisory authority over the court's judgments, and subsequently its judgments were reviewed by this Court, presumably as decisions of an inferior court created under Article III. *Supra*, pp. 54–56. Chief Justice Taney's description of the court, written when its decisions were considered to be subject to executive revision, therefore became inapplicable after 1866, when the objectionable clause of the 1863 Act was repealed and the court's judgments were made final.

And although *In re Sanborn* approved, inferentially at least, the exercise by the Court of Claims of a function characterized as “ancillary and advisory only” (148 U.S. at 226)—that of reporting its findings and opinions on claims referred to it by executive

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<sup>36</sup> Under the court's former “departmental reference” jurisdiction. See note 28, *supra*, p. 56.

departments<sup>37</sup>—it would appear from *O'Donoghue v. United States*, 289 U.S. 516, decided after *Bakelite*, that the exercise by the Court of Claims of some non-judicial functions is at best inconclusive as to its constitutional or legislative status. For *O'Donoghue*, holding the superior courts of the District of Columbia to be Article III tribunals, recognized at the same time Congress's authority under another constitutional provision (the District of Columbia clause of Article I) to vest those courts with non-judicial powers (289 U.S. at 550–551).<sup>38</sup> It is more likely, we submit, that the Court's implied approval, in *In re Sanborn*, of the exercise by the Court of Claims of some non-judicial functions is to be explained on the hypothesis that the Court there, as in *Wallace v. Adams*, 204 U.S. 415, 423 (cf. *Harrison v. Moncravie*, 264 Fed. 776, 781–782 (C.A. 8), appeal dismissed, 255 U.S. 562), interpreted *Gordon v. United States* as prohibiting only this Court, the sole court established by the Constitution itself, from exercising any non-judicial functions, than on the supposition that

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<sup>37</sup> The description of the court's function as "ancillary and advisory only" was restricted in the *Sanborn* opinion to "such a case," i.e., the case of an advisory opinion rendered without final judgment. 148 U.S. at 226. The function of rendering advisory opinions to the heads of executive departments, first given to the court in 1883, was repealed in 1953. See note 28, *supra*, p. 56.

<sup>38</sup> Thus, it is clear from the *O'Donoghue* decision that the power of Congress to confer non-judicial functions upon the District of Columbia superior courts stems from the fact that in establishing those courts Congress exercised dual powers, not from their character as legislative courts. We argue, *infra*, pp. 103–107, that the Court of Claims is similar to the District of Columbia courts in this respect.

the Court in *Sanborn* looked upon the Court of Claims as "legislative," deriving its authority from a source other than Article III. This conclusion is fortified by the consideration that at the time *In re Sanborn* was decided (1893) the conception of a legislative court as one in which non-judicial as well as judicial functions may properly be vested had not yet evolved—certainly not with any degree of clarity.<sup>39</sup> As we have shown (*supra*, pp. 61–65), this Court continued long after *In re Sanborn* to regard the Court of Claims as an Article III court. See, particularly, *Minnesota v. Hitchcock*, 185 U.S. 373, 384, 386 (1902).

In connection with its statement that "Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it" (279 U.S. at 451)—the primary and fundamental premise of the *Bakelite* opinion's conclusion that the Court of Claims was a legislative court

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<sup>39</sup> *American Insurance Co. v. Canter*, 1 Pet. 511, in which the distinction between constitutional and legislative courts had its origin, had no bearing on this aspect of the nature of a legislative tribunal. Probably the first suggestion of the notion (that non-judicial as well as judicial duties may be exercised by a legislative court) is to be found in the *Gordon* case, 117 U.S. at 699 (see *supra*, pp. 53–54)—though the statements in that case which might be thought relevant were made with respect to a court (the Court of Claims before 1866) which, properly speaking, had no judicial duties at all. The concept does not appear to have reached fruition prior to *Keller v. Potomac Electric Co.*, 261 U.S. 428 (1923) and, particularly, *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 700 (1927)—both of which involved the superior courts of the District of Columbia.

(see *supra*, pp. 18-19, 66-67)—the Court went on to say (*ibid.*):

The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

For the latter proposition the Court cited a number of its prior decisions (279 U.S. at 451, note 8). But in most of the cases cited, the tribunals involved, or about which the opinions spoke, were the regular federal courts, whose Article III status was and is unquestioned.<sup>40</sup> And wherever the question was raised, the Court assumed that the conditions placed by Article III upon the exercise of judicial power, including the existence of a "case" or "controversy," had to be met.<sup>41</sup> No attempt was made in the *Bakelite* opinion to reconcile its conclusion as to the legislative character of the Court of Claims with these decisions, which assumed the applicability of Article III to matters committed by Congress to judicial determination though not requiring such determination. See also our *Lurk brief*, No. 481, at pp. 90-94, where we show that the supposition that a court in which

<sup>40</sup> See *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 275, 280-285; *Grisar v. McDowell*, 6 Wall. 363, 379; *Auffmordt v. Hedden*, 137 U.S. 310, 329; *In re Fassett*, 142 U.S. 479, 486-487; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-660; *Passavant v. United States*, 148 U.S. 214, 218-219; *Fong Yue Ting v. United States*, 149 U.S. 698, 714-715, 727-732.

<sup>41</sup> See *Gordon v. United States*, 117 U.S. 697, 702; *Fong Yue Ting v. United States*, 149 U.S. 698, 728-729; *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 455.

Congress vests jurisdiction it need not have placed in any court is necessarily a legislative tribunal (deriving none of its authority from Article III) runs counter to the established jurisprudence of this Court and the practice of many decades.

The short of the matter is, we submit, that the previous decisions of this Court furnish no support for the conclusion reached in *Ex parte Bakelite*, and subsequently adopted in *Williams v. United States*, 289 U.S. 553 (see *infra*, pp. 73-74), that the Court of Claims, because it handles matters susceptible of judicial determination but not requiring it, does not derive its authority from Article III of the Constitution. And no reason, grounded in policy or logic, is advanced for that view. The fact that a court's business consists exclusively of matters which *need* not have been submitted for judicial determination would seem to be irrelevant in determining the nature of the power exercised by the court. The important consideration is that the matters were in fact so committed, and that the court's decisions are final and not revisable by the executive or legislative branch. Various matters have, historically, been submitted to constitutional courts although they could have been determined non-judicially, as the *Bakelite* opinion inferentially recognized. See 279 U.S. at 451, note 8; and discussion, *supra*, pp. 70-72, and in our *Lurk* brief, No. 481, at pp. 90-94. Moreover, the creation of special Article III courts to exercise particular types of jurisdiction is not foreign to our history,<sup>42</sup>

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<sup>42</sup> Cf. the former Commerce Court (as to which see our *Lurk* brief, notes 48 and 61, pp. 75-76, 95), the former Emergency Court

and in *Lockerty v. Phillips*, 319 U.S. 182, 187-188, this Court indicated that nothing in the Constitution prevents Congress from limiting the jurisdiction of the inferior tribunals established under Article III.

b. *Ex parte Bakelite* prepared the way for the decision in *Williams v. United States*, 289 U.S. 553 (1933), holding the Court of Claims to be a non-Article III tribunal—whose judges lacked the protection afforded by Article III against salary diminution during continuance in office. The Court acknowledged that the Court of Claims “undoubtedly \* \* \* exercises judicial power” (289 U.S. at 565), but held that it was not “the judicial power defined by Art. III of the Constitution” (*ibid.*). The Court “conceded at the threshold” that it had expressed a contrary opinion, “more or less irrelevantly,” in *United States v. Klein*, 13 Wall. 128, 145; *United States v. Union Pacific Railroad Co.*, 98 U.S. 569, 603; *Minnesota v. Hitchcock*, 185 U.S. 373, 386; *Kansas v. United States*, 204 U.S. 331, 342; and *United States v. Louisiana*, 123 U.S. 32, 35<sup>43</sup> (289 U.S. at 568). It adhered to and adopted its more recent *dictum* in the *Bakelite* case that the court was a legislative court (289 U.S. at 568-569). In doing so, it approved and reaffirmed the rationale of the *Bakelite* opinion that a court created by Congress to hear and determine matters not requiring (though susceptible of) judicial determination is a legislative tribunal and de-

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of Appeals (as to which see *id.*, note 61, p. 95), and—as we maintain in the *Lurk* case—the Court of Customs and Patent Appeals.

<sup>43</sup> See *supra*, pp. 61-64.

rives none of its powers from the Judiciary Article. *Id.* at 569, 571.

A second basis of the *Williams* decision—one not considered in *Ex parte Bakelite*—had to do with the scope of the clause “Controversies to which the United States shall be a Party,” to which “the judicial power of the United States,” as defined in Article III, Section 2, extends (289 U.S. at 571–578).<sup>44</sup> The *Williams* opinion, while conceding that claims against the United States (which constitute the ordinary subject matter of the Court of Claims’ jurisdiction) come literally within the purview of this phrase (289 U.S. at 573), held that such claims, nevertheless, fall without this category of controversies, properly construed—for the reason, the Court said, that “Controversies to which the United States shall be a Party” must be deemed to embrace only controversies to which the United States is a party *plaintiff*. The principal reason for this limited construction of the constitutional phrase, in the Court’s view, was that to construe it as including controversies to which the United States is a party defendant would be inconsistent with the principle of sovereign immunity—

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<sup>44</sup> The entire discussion in the *Williams* opinion of the scope and meaning of the clause “Controversies to which the United States shall be a Party” might from one point of view be considered as *dictum* (cf. *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 640–641, note 20 (opinion of Vinson, C.J.)). The fact, however, that the Court devoted over a third of the opinion to consideration of the point reflects at least that, if *dictum*, it was not casual. As we read the opinion, the Court’s view as to the scope of the “United States” clause amounted to a secondary basis of the decision. Certainly it strongly influenced the result.

that the government cannot be sued without its consent.

We show immediately below (pp. 75-91) that this rationale, in addition to being opposed to the Court's own prior pronouncements—see, in particular, *Minnesota v. Hitchcock*, 185 U.S. 373, 384, 386 (quoted *supra*, p. 64)—is unsound in principle and contrary to the clear intent of the framers of the Constitution.

#### 4. "CONTROVERSIES TO WHICH THE UNITED STATES SHALL BE A PARTY"

The flaw in the Court's reasoning, we believe, is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. From the premise that the phrase "Controversies to which the United States shall be a Party" was not intended as a blanket consent by the sovereign to be sued, the Court concluded that this prevented application of the provision even where consent had been given by Congress. But, like the other categories of controversies enumerated in Section 2 of Article III, this particular ground of jurisdiction does not dispense with other necessary conditions to the valid exercise of judicial power. The judicial power, for example, extends to suits between citizens of different states, but this does not automatically confer jurisdiction. The defendant must be brought into court by service of process, by consent to suit through filing an appearance, or by other accepted judicial processes. If a defendant is without the jurisdiction, he may often be sued only if he consents to jurisdiction. Similarly, when jurisdiction is invoked of a suit against the United States, the require-

ment as to obtaining personal jurisdiction over the defendant must still be observed, which means that the sovereign must consent to be sued. Once the question of personal jurisdiction is separated from that of the general jurisdiction of the court over the subject matter, it becomes plain that Mr. Justice Sutherland's correct premise that Article III, Section 2, was not a consent by the United States to be sued does not lead to his conclusion that Article III, Section 2, excludes from the constitutional jurisdiction of the inferior courts controversies to which the United States is a party defendant—if consent to suit is otherwise given.<sup>45</sup>

For his conclusion that the framers were using "party" only in the sense of "plaintiff," Mr. Justice Sutherland relied in *Williams* principally upon three historical circumstances: (1) that the doctrine of sovereign immunity from suit was well known at the time of the framing of the Constitution; (2) that, subsequent to the Convention, Marshall, Madison, and Hamilton expressed the view that Article III did not affect the immunity of individual states from suit; and (3) that, with respect to suits involving the United States, the Judiciary Act of 1789 conferred

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<sup>45</sup> The *Williams* case characterized as "peculiarly suggestive" "the omission to qualify 'controversies' by the word 'all', as in some other instances." 289 U.S. at 573. We have been able to discover no intimation whatsoever in the historical material to support this view, and submit that it will not bear analysis. The categories of controversies "between two or more States" and "between Citizens of different States" are similarly unqualified, but their comprehensiveness can hardly be questioned.

jurisdiction upon the circuit courts only "where \* \* \* the United States are plaintiffs, or petitioners" (§ 11, 1 Stat. 78). 289 U.S. at 573 *ff.* We submit that none of these reasons supports the conclusion reached.

#### **a. SOVEREIGN IMMUNITY AND THE POWER OF WAIVER**

While the doctrine of sovereign immunity was indeed a "well settled and understood" rule (289 U.S. at 573) at the time of the framing of the Constitution, it was also well known, both in England and in a number of the original states, that the sovereign could and often did waive immunity and consent to be sued.

i. In England, the waiver of immunity became known as early as the thirteenth century when the Petition of Right first evolved. This remedy was used for almost 400 years, and consisted of a petition to the Crown setting up the claim of legal right, which, after being endorsed "let right be done," was followed by a Commission issued out of Chancery to find the facts, an answer by the Crown to the petitioner's plea, and a trial on the issue in the King's Bench or the common-law side of the Chancery. As the centuries passed, this remedy against the Crown gave way to more expeditious procedures, and extended powers of relief against the Crown by judicial proceedings became available to the subject in several courts created during the reign of Henry VIII (the Courts of Augmentations, Wards, and Surveyors), subsequently merged into the Court of Exchequer. And while there appear to be no reported cases based

upon the petition of right between 1615 and 1800, several new remedies emerged. The English experience is summarized in greater detail in Appendix B, *infra*, pp. 130-137.

In 1668, it was first clearly recognized that a subject was entitled to equitable relief against the Crown in the Court of Exchequer (*Pawlett v. Attorney General*, Hardres 465). Rejecting the Crown's contention that the plaintiff's relief was solely by a petition of right, Chief Baron Hale granted relief to a mortgagor upon a bill against the Attorney General to redeem mortgaged lands seized by the King after the mortgagee's heir had been attainted of treason. And in the next century the jurisdiction of the Court of Exchequer to give equitable relief against the Crown was still recognized. *Reeve v. Attorney General*, 2 Atkyns 223 (1741); *Burgess v. Wheate*, 1 Eden 177, 225-256 (1757-1759); Bl. Comm., iii, 428-429. (See Appendix B, pp. 135-137, *infra*.)<sup>46</sup> Thus, waiver of sovereign immunity and consequent jurisdiction in the courts to entertain judicial proceedings and grant judgments against the Crown was known in England for many centuries before the adoption of the federal Constitution. In the eighteenth century, the already well-established rule that redress against the Crown could be secured through judicial proceedings must have been known to lawyers in the American colonies.

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<sup>46</sup> Where the relief sought from the Crown was payment of a sum due, a petition to the Barons of the Exchequer was held to lie, although petition of right was also available. *Bankers' Case*, 14 S.T. 1 (House of Lords, 1690-1700).

ii. The waiver of immunity was also known in this country both during and after the Revolution, and the courts of several of the original states were often entrusted with the adjudication of claims against the state. Broad statutory waivers of immunity were adopted in Maryland and Virginia, while a more restricted practice prevailed in Delaware, Connecticut, North Carolina, Georgia, and New Jersey. See Appendix B, *infra*, pp. 137-143. Thus, in Virginia, an Act of 1778 authorized suit in "the high court of chancery or the general court" upon any alleged right in law or equity "against the commonwealth," and the Supreme Court of the State observed that "there never has been a moment since October 1778 that all persons have not enjoyed this right by express statute" to sue the Commonwealth of Virginia. See *Higginbotham's Executrix v. Commonwealth*, 66 Va. 627, 637 (1874). Shortly after the Constitution was adopted, the Court of Appeals of Virginia upheld a judgment against the state for the value of an impressed vessel, upon a statutory reference of the claim to the judiciary after it had been administratively denied (*Commonwealth v. Cunningham & Co.*, 8 Va. 331 (1793)).<sup>47</sup>

Other states likewise had waivers of immunity. The early Delaware Constitution (1792) authorized suits "against the State, according to such regulations as shall be made by law" (*The Federal and State*

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<sup>47</sup> The opinion was written by Judge Pendleton who, as President of the Virginia Convention elected to consider the Constitution, had been instrumental in its ratification. The claimant was represented by "Marshall," presumably John Marshall. Cf. 2 Beveridge, *Life of Marshall*, p. 177.

*Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America*, H. Doc. 357, 59th Cong., 2d sess., vol. 1, pp. 568, 569). A Maryland statute passed January 20, 1787, antedating the Constitution, authorized actions at law against the state for money claims, with a jury trial. 2 Kilty, *Laws of Maryland*, c. LIII. In Georgia, persons claiming estates confiscated during the Revolution were permitted to appeal to the superior courts from determinations of a Board of Confiscation Commissioners (1 *Revolutionary Records of the State of Georgia*, pp. 334, 341-342; 3 *id.* 409). Compare a similar procedure in North Carolina (24 *State Records of North Carolina*, p. 212) and a somewhat different procedure in New Jersey, also permitting judicial determination of the right to an estate subject to confiscation (*Acts of the Council and General Assembly of the State of New Jersey* (1776-1783), compiled by Peter Wilson, Trenton (1784), printed by Isaac Collins, pp. 43-46).<sup>48</sup>

#### b. THE INTENT OF THE FRAMERS OF THE CONSTITUTION

The waiver of sovereign immunity was thus a common practice in Anglo-American law at the time of the adoption of the Constitution. If, as the *Williams*

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<sup>48</sup> See also indications of suits against the state in a 1789 statute of Connecticut (*Acts and Laws, Made and Passed by the General Court or Assembly of the State of Connecticut, in America; etc.*, Jan. 1789 (New London, printed by T. Green and Son), pp. 375-376); and in an early Delaware statute (*Laws of the State of Delaware* (1700-1797), printed by Smauel and John Adams, New Castle (1797), vol. 2, pp. 658-659). All these are more fully discussed in Appendix B, pp. 137-143, *infra*.

case suggests, the doctrine of sovereign immunity was known to the framers, the practice of waiving that immunity must have been equally familiar. That such was the case is in fact revealed in Hamilton's remarks in *The Federalist*, where he expressly distinguishes between suits with and suits without the consent of the sovereign. See Appendix C, pp. 144-148, *infra*. Against the century-old background of suits by consent against the Crown and the State, the use of the unqualified phrase "Controversies to which the United States shall be a Party" bespeaks an intention to extend the judicial power to cases where the United States is a party defendant upon a waiver of immunity, as well as where it is plaintiff.

Nothing in the proceedings of the Constitutional Convention indicates that the phrase in question was being used in a restrictive sense. On August 20, 1787, Charles Pinckney moved to add to the Report of the Committee of Detail the statement that "The Jurisdiction of the supreme Court shall be extended to all controversies between the U.S. and an individual State, or the U.S. and the Citizens of an individual State."<sup>49</sup> Two days later, the Committee of Detail

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<sup>49</sup> *Documents Illustrative of the Formation of the Union of the American States*, H. Doc. 398, 69th Cong., 1st sess., p. 572. A year prior thereto Pinckney had drafted and presented to Congress a report on August 7, 1786, calling for an amendment of the Articles of Confederation to provide for a Federal Judicial Court whose jurisdiction was to include appellate jurisdiction from state courts "in all causes \* \* \* wherein questions of importance may arise, and the United States shall be a party." Warren, *The Making of the Constitution*, p. 329. Subsequently he submitted the same plan to the Constitutional Convention, calling for a Supreme Federal Court with appelle-

recommended that the judicial power be extended to controversies "between the United States and an individual state or the United States and an individual person."<sup>50</sup> No action was ever taken on this recommendation, but on August 27, 1787, the Constitutional Convention adopted the phrase now appearing in Article III, Section 2—"Controversies to which the United States shall be a Party"—upon a motion by James Madison and Gouverneur Morris.<sup>51</sup> This "was evidently adopted as a substitute for the Committee's recommendation and was probably intended to cover the same ground."<sup>52</sup>

There is no evidence at the Constitutional Convention of any intention that the phrase in question, more sweeping in scope than any of the preceding proposals, was used in other than its plain meaning. The delegates, most of whom were trained at the bar,<sup>53</sup> must have known the difference between party plaintiff and party defendant, and must have been aware that the term "party" embraces both. Cf. *Chisholm v. Georgia*, 2 Dall. 419, 451 (opinion of Blair, J.). Since one can hardly attribute to the framers the prophetic ability to anticipate the derivation of judicial powers from an article professing to grant legislative powers, an intention to exclude from the federal judicial power the determination of claims against the government would be tantamount to an

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late jurisdiction from the state courts, including jurisdiction "in all Causes \* \* \* wherein [the] U.S. shall be a Party." H. Doc. 398, *op. cit.*, p. 965.

<sup>50</sup> H. Doc. 398, *op. cit.*, pp. 595-596.

<sup>51</sup> *Id.*, p. 624.

<sup>52</sup> Warren, *The Making of the Constitution*, pp. 536-537.

<sup>53</sup> Warren, *op. cit. supra*, p. 55.

intention to deny a mode of settling claims which had been available in the mother country for centuries. Such an intention is not easily to be conjured. The *Williams* opinion did not suggest any possible reason why the makers of the Constitution, if they had given thought to the United States as a party defendant, would not have placed such a suit within the judicial power which they were defining. The Court apparently was of the view that the framers assumed that the government could not be sued under any circumstances, and that therefore they did not intend Article III to give the courts jurisdiction over suits against the United States. It is more likely that, if the issue had been specifically presented, the framers would have disavowed any intention to exclude from the judicial power a class of cases, suits against the sovereign with its consent, which had been heard and decided by the English courts for centuries.<sup>54</sup>

The decision in the *Williams* case gains no support from the views of Marshall, Madison, and Hamilton on the suability of an individual state. Their remarks (set forth in Appendix C, pp. 144-146, *infra*) were addressed solely to the question whether there was a surrender of this immunity "in the plan of the convention." In denying that the Constitution affected the suability of the individual states, Marshall, Madison, and Hamilton were seeking to remove the fears of those, such as Patrick Henry, who believed that the federal Constitution automatically subjected the states to suit (See Appendix C, pp. 146-147, *infra*).

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<sup>54</sup> Cf. Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. 316, 407: "[I]t is a constitution we are expounding."

The Supreme Court rejected their interpretation in *Chisholm v. Georgia*, 2 Dall. 419 (1793), pointing out that the automatic waiver of state immunity, found in Section 2, did not necessarily mean an automatic waiver of federal immunity. But there is no hint that suits with the consent of the government would not be embraced within the section, for obviously none of the objections based upon sovereignty would apply where the state voluntarily submitted itself to court proceedings; and the statements of Marshall, Madison, and Hamilton had no relevance to such a situation.<sup>55</sup> In fact, in the Virginia debates

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<sup>55</sup> Despite the position taken by Marshall, Madison, and Hamilton, the Supreme Court in *Chisholm v. Georgia*, 2 Dall. 419, held that Article III subjected a state to suit without its consent by an individual citizen of another state. The opinion of Chief Justice Jay (at p. 478) included the following comments with respect to suits against the United States:

"Now, it may be said, if the word party comprehends both plaintiff and defendant, it follows, that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this, in all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction, important conclusions are deducible, and they place the case of a state, and the case of the United States, in very different points of view.

"I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not

on the Constitution, both Madison and Marshall expressly acknowledged that, if a state consents to be sued by a foreign nation, Article III would authorize jurisdiction in the federal courts over such a suit, by virtue of the clause in Section 2 extending the federal judicial power to controversies "between a State \* \* \* and foreign States \* \* \*". See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-324.

*Hayburn's Case*, 2 Dall. 409, decided within five years after the Constitution was adopted, likewise contains the implication that claims against the United States would be embraced within Article III, Section 2, if the requisite judicial procedures were provided. See *infra*, pp. 87-89.

#### c. THE JUDICIARY ACT OF 1789

Contrary to the suggestion in the *Williams* case, the Judiciary Act of 1789 (1 Stat. 73) is authority for, rather than against, the view that Article III of the Constitution extends the judicial power to suits against the United States. Section 11 of the Act gave

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to be thus collaterally and incidentally decided: I leave it a question."

These remarks are plainly confined to the question whether Article III, without more, removes the immunity of the United States from suit. Chief Justice Jay could not have had in mind suits to which the United States had consented, for there would then be no need for "power which the courts can call to their aid."

The only other contemporary references to the question whether the United States could be sued are a statement by George Nicholas, at the Virginia Convention, and a letter from Luther Martin (Attorney General of Maryland and delegate to the Constitutional Convention) addressed to the Maryland legislature. See Appendix C, pp. 147-148, *infra*.

to "the circuit courts \* \* \* original cognizance \* \* \* of all suits of a civil nature \* \* \* where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners." The *Williams* opinion thought that the words "where \* \* \* the United States are plaintiffs, or petitioners" delineated the scope of the phrase "Controversies to which the United States shall be a Party" in Article III. This assumes that Congress intended, by the Judiciary Act, to vest in the circuit courts all the judicial power conferred in Article III. But the Act and its legislative history contradict any such intention. Thus, Section 11 of the Act expressly withheld from the circuit courts the exercise of the judicial power over suits "where the matter in dispute" did not exceed five hundred dollars, even though nothing in Article III would preclude the bestowal of jurisdiction over such matters. Moreover, the House debates on the Act show that Congress recognized a clear distinction between the extent of the judicial power conferred by Article III and the degree to which it was to be vested in the inferior courts by the Act.<sup>56</sup> Under these circumstances, the more likely inference is that Congress used the words "plaintiffs or petitioners," rather than the exact language of Article III, to show that the Act was not intended to exhaust the judicial

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<sup>56</sup> *Annals of Congress*, vol. I, pp. 782-785, 796-833, *passim*. The discussion, if any, in the Senate is not available, since the debates of that body were not printed until 1794, and there appear to have been no printed reports or hearings on the Act.

power conferred in Article III, nor to operate as a consent to suit.<sup>57</sup>

#### d. THE EARLY AUTHORITIES

Less than five years after the Constitution became effective, all but one of the justices of this Court, in their capacity as judges of the federal circuit courts, considered the validity of an Act of Congress authorizing those courts to examine certain pension claims against the government by veterans with war-caused disabilities, to determine a just allowance for pension arrearages, to ascertain the degree of disability and "to transmit the result of their inquiry \* \* \* to the Secretary at War, together with their opinion in writing" as to the proportion of the monthly pay which would be equivalent to the ascertained degree of disability (Act of March 23, 1792, c. 11, § 2, 1 Stat. 244). The Act directed the Secretary at War, upon receipt of the proofs considered by the court and its opinion, to place the applicant's name on the pension list, unless the Secretary had "cause to suspect imposition or mistake," in which event he was authorized to withhold the name from the list and report the matter to Congress (§ 4).

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<sup>57</sup> The *Williams* case, 289 U.S. at 574, cited with approval the following *dictum* of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 411-412: "\* \* \* The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the *judiciary act does not authorize such suits.*" [Emphasis added.] This statement suggests that the Judiciary Act, which was confined to creating inferior courts and bestowing judicial powers upon them, could have "authorized" suits against the United States.

Acting on behalf of William Hayburn, a pension applicant, the Attorney General sought a writ of mandamus from this Court to require the Circuit Court for the District of Pennsylvania to act under this statute. Before the Court could decide the motion, the relevant portions of the statute were repealed (1 Stat. 324). However, the Circuit Courts for the Districts of New York, Pennsylvania, and North Carolina, containing five of the six members of this Court (Chief Justice Jay and Justices Cushing, Wilson, Blair, and Iredell) had previously expressed the opinion that the statute was invalid. *Hayburn's Case*, 2 Dall. 409. All agreed that the Act sought to vest non-judicial power in the courts since their decisions were made subject to revision by the executive and Congress. The significance of their opinions for present purposes, however, is the fact that all three assumed that Article III of the Constitution is applicable to the determination of claims against the government entrusted to the judiciary, and that before jurisdiction of controversies arising from such claims can be had by the courts, both the procedure and the tribunal must meet the requirements of that Article. Thus, the Circuit Court for North Carolina declared that the Secretary at War, who was vested by the Act with a power of review over the circuit courts, was incapable of acting as an appellate tribunal in respect to such claims, because such a tribunal (2 Dall. at 413)—

must consist of judges appointed in the manner the constitution requires, and holding their offices by no other tenure than that of their

good behavior, by which tenure the office of secretary at war is not held.

The opinions of the other two circuit courts make the same assumption. 2 Dall. at 410, 411. Since the justices and judges joining in these opinions included men who had been prominent in the drafting of the Constitution, their interpretation of that document less than five years after it became effective is an important contemporary guide to its meaning.

*United States v. Ferreira*, 13 How. 40 (1851), is a similar case, involving a special act of Congress authorizing the judge of the United States District Court for the Northern District of Florida to receive and adjudicate claims of certain named persons for damages due to the operations of the American Army in Florida. The judge's decision, with the evidence on which it was founded, was to be reported to the Secretary of the Treasury, who was directed to pay the same "on being satisfied that the same is just and equitable." 3 Stat. 768; 6 Stat. 569; 9 Stat. 788. This Court held that it had no jurisdiction of an appeal from a decision by the district judge on such claims. The ground for the decision, as set forth in an opinion by Chief Justice Taney, was that since the judge's decision was not final until approved by the Secretary of the Treasury, the power to decide the claims was not conferred "as a judicial function" in "the sense in which judicial power is granted by the Constitution to the courts of the United States." 13 How. at 46-48.<sup>58</sup>

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<sup>58</sup> The Chief Justice observed that the special act merely conferred authority upon the judge as "a commissioner to adjust

The rationale in both these cases is the same: what prevented the jurisdiction exercised by the inferior courts from being Article III judicial power was *not* the fact that the subject matter consisted of a claim against the United States, but the revisory power in the legislative or executive: As we have pointed out (*supra*, pp. 52-56), that was later made explicit in three cases dealing with the power of this Court to review decisions of the Court of Claims: *Gordon v. United States*, 2 Wall. 561, 117 U.S. 697, which held that the revisory power over decisions of the Court of Claims at one time vested in the Secretary of the Treasury and Congress precluded review of that court's judgments by this Court; and *United States v. O'Grady*, 22 Wall. 641, and *United States v. Jones*, 119 U.S. 477, which upheld the exercise of such appellate review after the revisory power was eliminated.

This conclusion is reenforced by *Chisholm v. Georgia*, 2 Dall. 419, holding, within five years of the ratification of the Constitution and with the participation of prominent members of the Constitutional Convention, that "Controversies \* \* \* between a State and Citizens of another State" (another of the categories of controversies to which Article III extended the federal judicial power) and "Cases \* \* \* in which a State shall be Party" (as to which this Court was given original jurisdiction) included suits brought *against* a State by citizens of a different State. This ruling seems to us vir-

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certain claims against the United States." 13 How. at 47. The Court declined to decide whether the judge could validly act in this capacity since the issue was not before the Court (at 51-52).

tually conclusive that the term "party" as used in Article III was not intended to be limited to plaintiffs. It seems most unlikely that the term as used in the phrase extending the judicial power to controversies "to which the United States shall be a Party" was intended to refer only to the United States as a plaintiff, if the term as used in the phrase conferring original jurisdiction upon this Court over cases "in which a State shall be Party" applied whether the State was a plaintiff or a defendant. If the framers had intended the term "party" in the former context to be limited in the manner that the *Williams* decision suggests, it seems almost certain that they would have made the limitation explicit.

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In view of the foregoing considerations, we believe that the grant of jurisdiction in Article III, Section 2, is not limited to cases in which the United States is a party plaintiff. The historical background upon which this conclusion is predicated was not, in all its aspects, before the Court in the *Williams* case. We submit that the words of Article III, read literally and in their historic setting, demonstrate that *Minnesota v. Hitchcock* and the earlier authorities, rather than *Williams v. United States*, state the correct doctrine, and that the judicial power exercised by the Court of Claims is part of that defined in Article III.

5. "CASES, IN LAW AND EQUITY, ARISING UNDER THIS CONSTITUTION, THE LAWS OF THE UNITED STATES \* \* \*"

A question not considered in the *Williams* opinion is whether the cases heard by the Court of Claims

do not fall within the "federal question" jurisdiction defined in Article III—"Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, \* \* \*." If they do, it would appear to be irrelevant whether, in addition, they are embraced within the category "Controversies to which the United States shall be a Party." If either category applies, the court exercises the judicial power of the United States. We think the issues it decides come under both categories.

The principal jurisdictional statute pertaining to the Court of Claims (28 U.S.C. 1491 (Appendix A, *infra*, pp. 115-116)) vests in the court the power—

to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.<sup>59</sup>

Even with respect to claims based on contract, the authority so conferred is embraced within the federal question category, since all federal contracts must stem from some congressional authority. Cf. *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 649 (opinion of Frankfurter, J.); *Eastern Extension Telegraph Co. v. United States*,

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<sup>59</sup> The section derives, with minor variations in language, and apart from details having no present relevance, from Section 1 of the Tucker Act of 1887 (see *supra*, p. 57). The same section of the Tucker Act gave the court power to render judgment *against* the claimant on set-offs and counterclaims by the government. The latter power is now provided for in 28 U.S.C. 1503 (Appendix A, *infra*, p. 116).

251 U.S. 355, 365-366. To the extent that its power extends to the adjudication of claims founded on the Constitution, any Act of Congress, or any regulation of an executive department, we do not see how there can be any doubt that this is so. *Hayburn's Case*, 2 Dall. 409; *Osborn v. United States Bank*, 9 Wheat. 738, 819; *United States v. Ferreira*, 13 How. 40, 46-50; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 284; *Gordon v. United States*, 117 U.S. 697; *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 487; *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 455-458; *Muskrat v. United States*, 219 U.S. 346; *Tutun v. United States*, 270 U.S. 568, 576-577. And see the opinions of Mr. Justice Rutledge, Chief Justice Vinson, and Mr. Justice Frankfurter in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 610, 640-642 (notes 20-21), 649.

The fact that this Court in literally hundreds of cases has granted review of Court of Claims judgments—since its decisions were given finality in 1866, and in particular has granted review since *Williams* was decided—is further indication that the Court has considered that these cases present federal questions within the scope of Article III. If *Williams* was correct in holding that Article III does not endow any Article III court with power to decide cases in which the United States is the defendant, then the only basis for this Court's power to review decisions of the Court of Claims (as well as of District Court Tucker Act rulings) is the federal questions clause of Article III. There would be no other head of

jurisdiction under the Constitution. In addition, the same authority exercised by the Court of Claims is also exercised by the district courts—subject to a \$10,000 limitation as to the amount of any claim. 28 U.S.C. 1346(a)(2) (Appendix A, *infra*, pp. 114–115). If such claims involve federal question jurisdiction when heard by the district courts,<sup>60</sup> it would obviously be incongruous to suppose that they do not involve such jurisdiction when heard by the Court of Claims, whose power is subject to no jurisdictional limit.

*C. Doubt as to the nature of the Court of Claims should be resolved in favor of its Article III genesis, in the light of Congress's 1953 declaration*

Our analysis of the *Williams* decision and rationale in the light of the relevant historical materials has thus far taken no account of the 1953 declaration by Congress that the Court of Claims was in fact established under Article III of the Constitution. See *supra*, pp. 26–36. Implicit in that declaration, as the legislative history of the enactment makes clear, was the view of Congress that this Court, in holding in *Williams* that the Court of Claims was a legislative court, reached an erroneous conclusion as to the constitutional powers of Congress that body exercised and intended to exercise in establishing the court.

Whatever doubt might remain as to the soundness or unsoundness of the *Williams* decision, apart from the 1953 declaration, ought now to be resolved in

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<sup>60</sup> Cf. *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 610, 640–642 (notes 20–21), 649–650 (opinions of Mr. Justice Rutledge, Chief Justice Vinson, and Mr. Justice Frankfurter).

favor of the correctness of the congressional conclusion—*i.e.*, that *Williams* mistakenly construed the effect and intent of Congress's action in establishing the court. It needs no elaborate argument that this Court should accord great weight to a formal and authoritative declaration by Congress, as the creator of a judicial tribunal, proclaiming which of its powers it exercised in bringing the court into being. Particularly should this be so where the relevant history indicates that Congress actually intended to create the Court of Claims in the exercise of its Article III authority—just as, in 1953, it said it did.

*D. There is no constitutional obstacle to the conclusion that the Court of Claims was validly established by Congress under Article III*

There remain to consider two possible constitutional objections to the conclusion that the Court of Claims was validly established by Congress under the Judiciary Article. Neither, in our view, has merit.

**1. THAT THE COURT OF CLAIMS LACKED THE POWER TO RENDER FINAL JUDGMENTS PRIOR TO 1866 IS CONSISTENT WITH THE VIEW THAT IT ACQUIRED ARTICLE III STATUS WHEN, IN THAT YEAR, THAT POWER WAS GIVEN TO IT**

*a.* We have seen that the Court of Claims, from its creation in 1855 until the passage of the Act of March 3, 1863 (as amended by the Act of March 17, 1866, repealing the 14th section of the 1863 Act), possessed all the attributes of an Article III tribunal with the single exception—important as that exception undeniably was—that it lacked the power to render final

judgments. It was staffed by judges with life tenure, appointed by the President by and with the advice and consent of the Senate. It had the power to hear all claims against the United States "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States," as well as all claims referred to it by either house of Congress. It had the authority to establish rules and regulations for its governance and to issue commissions and appoint commissioners for the taking of testimony. It had the power of subpoena—in the same measure and with like effect as that possessed by the district courts. False swearing before it, or any commissioner appointed by it, was punishable as perjury in the same manner as the like offense in any federal court. *Supra*, pp. 43–48.

The one respect in which it differed from the regular federal courts of that time (apart from the special nature of the subject matter of its jurisdiction)<sup>61</sup> was that, unlike the regular courts, which were vested with the power to render final judgment in the controversies they heard, the Court of Claims' authority was limited to reporting its findings and conclusions to Congress—including the preparation of bills, for congressional approval, awarding the relief thought appropriate if the decision was in favor of the claim-

<sup>61</sup> The subsequent creation of the Commerce Court and the Emergency Court of Appeals shows that Congress can validly establish Article III courts with limited jurisdiction. See *Lockerty v. Phillips*, 319 U.S. 182, 187–188.

ant. Congress retained the power to approve or reject its judgments. *Supra*, pp. 48-49.

In 1863, in response to the recommendation of the President, Congress sought, by the enactment of the Act of March 3, to relinquish its power of revision over the judgments of the court and to make them final, subject only to appeal to this Court in cases in which the amount in controversy exceeded \$3,000 and in certain other instances. *Supra*, pp. 49-51. Were it not for the 14th section of that Act, which was added to the measure during the floor debates, and which this Court construed in *Gordon v. United States*, 2 Wall. 561, 117 U.S. 697, as granting to the Secretary of the Treasury a revisory authority over the court's judgments, the 1863 Act would have made its judgments final in the sense required by this Court as a condition of its exercise of appellate review. As it was, as a consequence of the *Gordon* interpretation, the court's judgments did not achieve finality until the passage of the Act of March 17, 1866, repealing Section 14 of the 1863 Act. Thereafter, this Court regularly and without question reviewed its judgments. *Supra*, pp. 52-56.

It is our position that, with the passage of the 1866 Act, and the elimination of the last remaining obstacle to its recognition by this Court as a tribunal whose decisions could be reviewed consistently with the finality requirements imposed by Article III, the Court of Claims succeeded to full status as an Article III tribunal. There is no constitutional objection to this conclusion. Certainly, this Court perceived none when in *United States v. Klein*, 13 Wall. 128, it de-

clared that the Court of Claims, though originally a court "merely in name," had, by the 1863 and 1866 amendments to its original organic act, become a court in fact as well, and was then "constituted one of those inferior courts which Congress authorizes \* \* \* from which appeal regularly lies to this court" (at 144-145; see *supra*, pp. 62-63). The "inferior courts which Congress authorizes" can be none other, as we have suggested, than the "inferior Courts" which Congress is authorized by Article III, Section 1, "from time to time" to "ordain and establish." The Court thus recognized—without the suggestion of any constitutional difficulty—the emergence of the Court of Claims from a body whose judgments lacked the essential judicial attribute of finality into an Article III court.

b. If Congress, instead of simply amending the organic act establishing the Court of Claims so as to make its judgments final, had abolished the court and immediately reconstituted it as before (except with the power to render final judgments), and if the incumbent judges had then been immediately reappointed by the President and confirmed by the Senate, there could be no question as to the legitimacy of the process of thus converting the body into a court of Article III status. Essentially the same result, we contend, was achieved by what was actually done. The fact that the process followed did not contemplate the reappointment and reconfirmation of the incumbent judges did not prevent the achievement of that result.

Conceivably, if the judges had previously served under tenures for fixed periods or at the pleasure of the President, their reappointment and reconfirma-

tion to positions on what was thenceforth to be an Article III tribunal might have been required. In fact, however, the incumbent judges already had life tenure, and their salaries were fixed by law. It would seem an unduly rigid interpretation of the Constitution to hold that, in these circumstances, their renomination by the President and reconfirmation by the Senate were required. Congress, by investing the judgments of the court with finality—the only factor which was a bar to its possession of Article III status—merely gave up (in addition to its revisory authority over the court's judgments) its power to reduce the judges' tenure and diminish their compensation. Though this change sufficed to make the court an Article III court and its judges Article III judges, it cannot be said to have interfered in any meaningful or substantial sense with the President's appointment power—any more than, for example, a statutory increase in the salaries or emoluments of the judges would have had this effect. As we point out in our *Lurk* brief, No. 481, at pp. 48-49, Congress has often made far more drastic alterations in the tenure or compensation of incumbent officials without encroaching upon the Presidential power of appointment. "It cannot be doubted," as this Court observed in *Shoemaker v. United States*, 147 U.S. 282, 301, " \* \* \* that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." In the absence of a clear congressional purpose to abolish the old office and create a new one, a change of the type involved here

did not constitutionally require new appointments and new confirmations.

c. If it be assumed, *arguendo*, that the transition of the court from non-Article III to Article III status could not constitutionally be accomplished without giving the President the right to reappoint the incumbent judges or to make new appointments, and the Senate the right to approve or reject the nominees, it would be our contention that the rights were waived. At least, so far as we are aware, no question was ever raised concerning the matter. Both the 1863 and 1866 Acts were approved by the respective Presidents then in office, with knowledge that the incumbent judges, under the plan of the statutes, were to continue in office. Furthermore, the only judges about whose tenures a question could arise were those sitting on the effective date of the 1866 Act. If our argument that the court became an Article III tribunal at that time be sound, not even a theoretical problem exists as to the judges appointed since that date—whose number of course includes nearly all the judges who have sat on the court.

In any event, the court became a constitutional tribunal in 1911 with the enactment of the Judicial Code of that year. We have pointed out that the existing statutory provisions pertaining to the duties, functions, and powers of the Court of Claims were at that time transferred to the Code and codified as Chapter Seven, together with the corresponding provisions relating to the regular federal courts (*supra*, pp. 59-60). While the 1911 Code, in terms, provided that the court should "be continued," it also reenacted

the substance of the court's organic act, or "charter." Section 136 provided (36 Stat. 1135) :

The Court of Claims, established by the Act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. The chief justice shall be entitled to receive an annual salary of six thousand five hundred dollars, and each of the other judges an annual salary of six thousand dollars, payable monthly, from the Treasury.<sup>62</sup>

At the time of this reenactment of the court's charter, the court, as we have seen, had been explicitly declared by this Court, on at least three occasions, to be an Article III tribunal (*United States v. Klein*, 13 Wall. 128, 144–145 (1871); *United States v. Union Pacific Railroad Co.*, 98 U.S. 569, 603 (1878); *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902)), and on other occasions this Court had at least so assumed or implied. *Supra*, pp. 61–65. Since Congress, when it reenacts a statute, is presumed to adopt the construction given to the same language in the prior statute (see, e.g., *Shapiro v. United States*, 335 U.S. 1, 16, and cases cited), Congress, in reenacting the organic legislation establishing the

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<sup>62</sup> The language of the section was derived, with minor changes, from Section 1049 of the Revised Statutes.

Court of Claims, must be presumed to have intended to adopt the then settled view that the Court of Claims was an Article III tribunal. In a real sense, therefore, Congress can be said to have re-created or re-constituted the Court of Claims as a constitutional tribunal when it enacted the Judicial Code.

**2. THE SUBSEQUENT VESTING IN THE COURT OF CERTAIN NON-JUDICIAL FUNCTIONS (IN ADDITION TO ITS JUDICIAL DUTIES) DID NOT AFFECT ITS ARTICLE III STATUS.**

In 1883, some seventeen years after the court acquired Article III status (under our analysis of the effect of the 1863 and 1866 Acts), Congress conferred on the court, in addition to its regular judicial duties, certain non-judicial functions of an essentially advisory nature—its so-called congressional and departmental reference jurisdiction. Section 1 of the Act of March 3, 1883, c. 116, 22 Stat. 485 (Appendix A, *infra*, pp. 125–126), provided that whenever any claim or matter involving the necessity of investigating and determining facts was pending before either house of Congress or any committee of either house, the house or committee might refer the matter to the Court of Claims, which was to inquire into the matter and, without entering any judgment, to report its findings and conclusion to the house or committee by which the matter had been referred. The court still retains this function.<sup>63</sup> Section 2 of the 1883 Act

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<sup>63</sup> As subsequently amended, this provision is now contained in 28 U.S.C. 1492 and 2509 (Appendix A, *infra*, pp. 116–117). A similar advisory function—that of examining and reporting to Congress concerning certain special claims (now of only historical interest) known as the French Spoliation Claims—

provided for the similar referral to the court of matters and claims pending in any executive department involving controverted questions of fact or law; the court was to report its findings and opinions to the referring department for its guidance and action. This provision, as later amended,<sup>64</sup> was repealed in 1953.<sup>65</sup> We submit that the conferring of these non-judicial functions on the court did not destroy or affect its Article III status.

a. In the first place, the granting of these special advisory functions to the court could not have impaired its constitutional status as a tribunal deriving its authority from Article III if, as we have argued, it had that status previously. If the court was a constitutional tribunal prior to 1883, the attempted vesting by Congress of inconsistent powers could not have altered its character. At most, the attempt to grant such authority would have been ineffectual.<sup>66</sup> See *Pope v. United States*, 323 U.S. 1, 13.

b. But we do not believe that the vesting of these additional functions was inconsistent with the court's Article III nature. *O'Donoghue v. United States*, 289 U.S. 516, indicates that the possession by a federal court of some powers and functions not judicial in character is compatible with its status as a tribunal ordained and established under Article III. 289 U.S.

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was given to the court by the Act of January 20, 1885, c. 25, 23 Stat. 283.

<sup>64</sup> See 28 U.S.C. (1952 ed.) 1493.

<sup>65</sup> Act of July 28, 1953, c. 253, § 8, 67 Stat. 226.

<sup>66</sup> We suggest below (note 70, *infra*, pp. 107-108) that the judges of the Court of Claims may be acting as commissioners in reporting to Congress in congressional reference cases.

at 545-548, 550-551. The *O'Donoghue* case held that the superior courts of the District of Columbia were established by Congress pursuant to its court-creating authority under Article III, with the consequence that the judges of those courts enjoy the immunity guaranteed by that article against reduction of their compensation during their continuance in office. 289 U.S. at 551. At the same time, the Court recognized the authority of Congress, acting under its plenary power to legislate for the District of Columbia (Article I, Section 8, clause 17), to vest in the courts of the District, in addition to their Article III judicial functions, administrative and even legislative powers,<sup>67</sup> which could not have had their source in Article III. 289 U.S. at 545-548, 550-551.

We submit that the rationale of the *O'Donoghue* case is also applicable to the Court of Claims with respect to its special advisory powers. For one thing, that court, like the courts of the District, is located at the seat of government, within the area over which Congress possesses exclusive power to legislate.<sup>68</sup> Congress can, pursuant to the same authority which it exercises in conferring non-judicial powers on the or-

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<sup>67</sup> See, e.g., *Keller v. Potomac Electric Co.*, 261 U.S. 428, 440-443 (review of rate making); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 698-701 (patent and trade-mark appeals); *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 467-468 (review of radio station licensing; cf. *Federal Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 274-278); see also D.C. Code, § 31-101 (authorizing District Court judges to appoint members of the Board of Education).

<sup>68</sup> The District is the official station of the court's judges (28 U.S.C. 456), and the court is required by law to hold an annual term "at the seat of government" (28 U.S.C. 174).

dinary courts of the District, validly vest similar powers in the Court of Claims, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept. It is true, of course, that the functions of the Court of Claims are national in scope and that its jurisdictional subject matter and area of interest are in no sense confined to the geographical limits of the District of Columbia. But it is also true that neither the judicial nor the non-judicial functions of the ordinary superior courts of the District are necessarily limited to matters of concern only to the District. This Court has never suggested, for instance, that the non-judicial functions of the Court of Appeals for the District of Columbia must be confined to District matters. For example, the radio station whose licensing was involved in *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (see note 67, *supra*, p. 104), was located in Schenectady, New York. The authority of Article I, Section 8, clause 17, which has been held sufficient basis for imposing general federal functions, non-judicial in character, on the Court of Appeals, should suffice, too, for doing the same with respect to another court within the District. While the Court of Claims is national in the scope of its functions, the congressional power relating to the District of Columbia is also national in scope and may be exercised beyond the confines of the District. See *Cohens v. Virginia*, 6 Wheat. 264, 424, 425, 428-429; *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 600-602 (opinion of Jackson, J.).

Furthermore, we suggest that Congress may properly draw upon its other Article I powers in adding non-judicial functions to the Court of Claims. The plenary power of Congress "to pay the Debts \* \* \* of the United States" (Article I, Section 8, clause 1 (Appendix A, *infra*, p. 113)) sustains the establishment of such non-judicial machinery. The problem is, of course, the joinder of these functions with the court's judicial responsibilities stemming from Article III. In the past, this Court and individual Justices have rejected, in general terms, the exercise by federal constitutional courts, other than the District of Columbia courts, of non-judicial functions. See, e.g., *Ex parte Bakelite Corporation*, 279 U.S. 438, 454; *O'Donoghue v. United States*, 289 U.S. 516, 546-547, 551; *Williams v. United States*, 289 U.S. 553, 569; *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582. Theoretically it is difficult to distinguish, in this connection, the District of Columbia power in Article I, Section 8, from the other heads of legislative authority in Article I. But the Court's concern for the nationwide federal court system prompts the thought that there well may be a difference, with respect to the joinder of non-judicial functions, between this Court and the regular federal courts in the states, on the one hand, and special constitutional courts established for special purposes, on the other. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment<sup>69</sup>—mainly the fear of unloosing upon

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<sup>69</sup> See, e.g., *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590-591, 616, 628-629, 648-649.

those courts a mass of duties foreign to their role as judges—apply with less force to the specialized tribunals with their limited functions and areas of responsibility (particularly the specialized courts determining issues between citizens and their government). The analogy of the District of Columbia courts indicates that, so long as these specialized courts are primarily endowed with judicial power under Article III, the addition of certain non-judicial functions is valid and does not destroy the Article III character of the court. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both Article III powers and certain non-judicial functions pertaining to matters falling within the field of its judicial competence—that, for example, with specific reference to the Court of Claims, if Congress desires an advisory opinion as to the merits of a claim against the United States to which it proposes to give legislative consideration in the form of a private bill, it is constitutionally required to establish a special body for that purpose only, and may not make use of an existing court which, being staffed with judges expert in the field of claims, is well qualified to advise the legislature. Properly applied, the principle of the separation of powers does not compel that result.<sup>70</sup>

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<sup>70</sup> There is some authority for the proposition that even judges of the regular federal courts may act non-judicially in a voluntary capacity analogous to that of a commissioner. In *Hayburn's Case*, 2 Dall. 409, the three circuit courts expressed their opinion that the determinations which Congress had asked them to make of pension claims against the govern-

## IV

**THE CONGRESSIONAL DECLARATION IN THE 1953 ACT  
SHOULD BE GIVEN AT LEAST PROSPECTIVE EFFECT**

A. If the Court, adhering to its *Williams* decision, should hold that the congressional assumption underlying the declaration in the 1953 Act—that the Court of Claims already was an Article III court—is insupportable on historical or other grounds, we submit that the Act should be given at least prospective effect, *i.e.*, that the court should be held to have been made an Article III tribunal by the Act. Cf. *Postmaster-General v. Early*, 12 Wheat. 136, 148–149; *United States v. Clafin*, 97 U.S. 546, 548–549. As observed by Chief Justice Marshall in the *Early* case (holding that a statute which purported to vest certain jurisdiction in district courts “concurrent with” the circuit courts, effectually gave the jurisdiction to the circuit courts, though the assumption of the act—

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ment, subject to review by the Secretary of War, did not involve the judicial power of the United States which they were capable of exercising. The Circuit Court for the District of New York, consisting of Chief Justice Jay, Associate Justice Cushing, and District Judge Duane, was of the opinion, however, that the individual judges of the circuit court were capable of performing those functions as “commissioners” and not as a court. Subsequently the judges of some district courts did act in such capacity. See *United States v. Ferreira*, 13 How. 40; see also the note concerning the unreported 1794 case of *United States v. Yale Todd*, appended to the report of the *Ferreira* case (p. 51). The judges of the Court of Claims have said that they assume the performance of like advisory functions at the request of Congress, sitting as commissioners and not as a court. See *Sanborn v. United States*, 27 C. Cls. 485, 490, mandamus to permit appeal denied, *In re Sanborn*, 148 U.S. 222. Cf. *Zadeh v. United States*, 124 C. Cls. 650.

that the circuit courts already possessed the power in question—was mistaken) :

It is true, that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law, does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction.

\* \* \* [12 Wheat. at 148-149.]

It cannot be doubted that the 1953 Act, “declar[ing]” the Court of Claims “to be a court established under article III of the Constitution,” used language that is capable of being given at least future effect—particularly if such construction is necessary to effectuate the congressional intention to the extent constitutionally possible.

B. Nor, we submit, are there valid constitutional objections to this construction. The possible argument that such an interpretation would require the reappointment and reconfirmation of the incumbent judges has already been answered. See *supra*, pp. 97-100. It is sufficient at this point to stress that the judges who sat on the court at the time of the 1953 enactment, like the judges of 1866, already had life tenure (as required by Article III), and had already

been appointed by the President and confirmed by the Senate (as required by Article II, Section 2). All that Congress surrendered by the 1953 Act (if, as we are here assuming, the court thereby became an Article III court) was its theoretical power to shorten the judges' tenure and reduce their compensation. For the reasons previously suggested, the relinquishment of this power, in our view, hardly sufficed to require that the incumbent judges again be nominated and confirmed. It is certain that neither Congress nor the President thought so.

The nature of the powers exercised by the court likewise presents no constitutional impediment to construing the 1953 Act as making the court a constitutional tribunal. Its basic jurisdiction has been purely judicial, as we have seen, since 1866. See *supra*, pp. 49-56; *Pope v. United States*, 323 U.S. 1, 13. And there is no valid reason, as we have argued (*supra*, pp. 103-107), why the court may not be permitted to continue to exercise its essentially advisory congressional reference jurisdiction as a constitutional court. In any event, to the extent that doubt may exist as to the compatibility of this advisory function of the court with constitutional status, the doubts were brought to the attention of the House Judiciary Committee by Judge Madden in testifying with respect to the bill that became the 1953 Act,<sup>71</sup> and Senator Gore discussed the problem during the Senate debates. 99 Cong. Rec. 8943-8944. Thus Congress, by enacting the 1953 statute, elected to give the court constitutional

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<sup>71</sup> The hearings held by the committee have not been printed.

status (or, as we have primarily contended, to clarify that status) regardless of what effect its action might be deemed to have on its advisory duties.

For these reasons, we submit that the status of the Court of Claims as an Article III court has been settled by the 1953 Act insofar as the period since that statute is concerned, whatever may have been its status prior to that time.

#### **CONCLUSION**

For the foregoing reasons it is respectfully submitted that the Act of July 28, 1953, c. 253, § 1, 67 Stat. 226, declaring the Court of Claims to be a court established under Article III of the Constitution, is valid, and that the judgment below was not vitiated by the participation of a Court of Claims judge.

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JANUARY 1962.

## APPENDIX A

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

#### I. *Constitutional Provisions*

##### 1. Article I, Section 8, of the United States Constitution:

SECTION 8. The Congress shall have Power [Clause 1] To lay and collect Taxes, Duties, Imposts and Excises, to Pay the Debts \* \* \* of the United States \* \* \*;

\* \* \* \* \*

[Clause 9] To constitute Tribunals inferior to the supreme Court;

\* \* \* \* \*

[Clause 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States \* \* \*;—And

[Clause 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers \* \* \*.

##### 2. Article III of the United States Constitution:

SECTION 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under

this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— \* \* \* to Controversies to which the United States shall be a Party; \* \* \*.

\* \* \* \* \*

## II. *Statutes*

1. 28 U.S.C. 171 (as amended by Section 1 of the Act of July 28, 1953, c. 253, 67 Stat. 226; see *infra*, pp. 128–129):

*§ 171. Appointment and number of judges; character of court.*

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

2. 28 U.S.C. 293(a):

*§ 293. Judges of other courts.*

(a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

3. 28 U.S.C. 1346:

*§ 1346. United States as defendant.*

(a) The district courts shall have original

jurisdiction, concurrent with the Court of Claims, of:

\* \* \* \* \*

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title [Tort Claims Procedure], the district courts \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

\* \* \* \* \*

#### 4. 28 U.S.C. 1491:

*§ 1491. Claims against United States generally; \* \* \**

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any

express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

\* \* \* \* \*

**5. 28 U.S.C. 1492:**

*§ 1492. Congressional reference cases.*

The Court of Claims shall have jurisdiction to report to either House of Congress on any bill referred to the court by such House, except a bill for a pension, and to render judgment if the claim against the United States represented by the referred bill is one over which the court has jurisdiction under other Acts of Congress.

**6. 28 U.S.C. 1503:**

*§ 1503. Set-offs.*

The Court of Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.

**7. 28 U.S.C. 1504:**

*§ 1504. Tort claims.*

The Court of Claims shall have jurisdiction to review by appeal final judgments in the district courts in civil actions based on tort claims brought under section 1346(b) of this title [see *supra*, p. 115] if the notice of appeal filed in the district court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims.

**8. 28 U.S.C. 2509:**

*§ 2509. Congressional reference cases.*

Whenever any bill, except for a pension, is referred to the Court of Claims by either House of Congress, such court shall proceed with the same in accordance with its rules and report to such House, the facts in the case, including facts relating to delay or laches, facts

bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy.

The court shall also report conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

9. The Act of February 24, 1855, c. 122, 10 Stat. 612, entitled "An Act to establish a Court for the Investigation of Claims against the United States":

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a court shall be established to be called a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behaviour; and the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress. It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had; specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. Each of the said judges shall receive a compensation of four thousand dollars per annum, payable quarterly, from the treasury of the United States, and shall take an oath to sup-

port the Constitution of the United States and discharge faithfully the duties of his office.

SEC. 2. *And be it further enacted*, That a solicitor for the United States, to represent the government before said court, shall be appointed by the President, by and with the advice and consent of the Senate. It shall be the duty of said solicitor to prepare all cases on the part of the government for hearing before said court, and to argue the same when prepared; to cause testimony to be taken, when necessary to secure the interest of the United States; to prepare forms, file interrogatories, and superintend the taking of testimony, in the manner prescribed by said court, and generally to render such services as may be required of him from time to time, in the discharge of the duties of his office. Said solicitor shall be sworn to faithful discharge of the duties of his office, in the manner prescribed for the qualification of the judges in the first section of this act; and he shall receive a compensation of three thousand five hundred dollars per annum for his services, to be paid quarterly from the treasury of the United States.

SEC. 3. *And be it further enacted*, That the said court shall have authority to establish rules and regulations for its government; to appoint commissioners to take testimony to be used in the investigation of claims that may come before it; to prescribe the fees they shall receive for their services, and to issue commissions for the taking of such testimony, whether the same shall be taken at the instance of the claimant, or of the United States, and also to issue subpoenas to require the attendance of witnesses in order to be examined before such commissioners: which subpoenas shall have the same force, as if issued from a district court of the United States, and compliance therewith shall be compelled under such rules and orders as the court hereby created shall establish.

When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when taken at the instance of the government, such fees, together with all postage incurred by the solicitor aforesaid in his official capacity, shall be paid out of the contingent fund provided for said court. In all cases, when it can be conveniently done, the testimony shall be taken in the county where the deponent resides; and the commissioner taking the same is hereby authorized and required to administer an oath or affirmation to the witnesses brought before him for examination.

*SEC. 4. And be it further enacted,* That in all cases where it shall appear to the court that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony in the case, until the same shall have been reported by them to Congress, as is hereinafter provided: *Provided, however,* That if Congress shall, in such case, fail to confirm the opinion of said board, they shall proceed to take the testimony in such case.

*SEC. 5. And be it further enacted,* That in taking testimony to be used in support of any claim before said court, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe, and like opportunity shall be afforded the claimant in cases where testimony is taken on behalf of the United States under like regulations.

*SEC. 6. And be it further enacted,* That if any person shall knowingly and wilfully swear falsely before said court, or before any person or persons commissioned by them, or authorized by this act to take testimony in a case pending before said court at the time of taking

said oath, or in a case thereafter to be submitted to said court, such person shall be deemed guilty of perjury, and, on conviction thereof, shall be subjected to the same pains, penalties, and disabilities which now are, or shall be hereafter, by law prescribed for wilful and corrupt perjury.

SEC. 7. *And be it further enacted,* That said court shall keep a record of their proceedings, and shall, at the commencement of each session of Congress, and at the commencement of each month during the session of Congress, report to Congress the cases upon which they shall have finally acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded. Any judge who may dissent from the opinion of the majority shall append his reasons for such dissent to the report; and such report, together with the briefs of the solicitor and of the claimant, which shall accompany the report, upon being made to either house of Congress, shall be printed in the same manner as other public documents. And said court shall prepare a bill or bills in those cases which shall have received the favorable decision thereof, in such form as, if enacted, will carry the same into effect. And two or more cases may be embraced in the same bill, where the separate amount proposed to be allowed in each case shall be less than one thousand dollars. And the said court shall transmit with said reports the testimony in each case, whether the same shall receive the favorable or adverse action of said court.

SEC. 8. *And be it further enacted,* That said reports, and the bills reported as aforesaid, shall, if not finally acted upon during the session of Congress to which the said reports are made, be continued from session to session, and from Congress to Congress, until the same

shall be finally acted upon, and the consideration of said reports and bills shall, at the subsequent session of Congress, be resumed, and the said reports and bills be proceeded with in the same manner as though finally acted upon at the session when presented.

**SEC. 9. *And be it further enacted,*** That the claims reported upon adversely shall be placed upon the calendar when reported, and if the decision of said court shall be confirmed by Congress, said decision shall be conclusive; and the said court shall not, at any subsequent period, consider said claims unless such reasons shall be presented to said court as, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

**SEC. 10. *And be it further enacted,*** That it shall be the duty of the Speaker of the House of Representatives, within a reasonable time after the passage of this act, to appropriate such rooms in the Capitol at Washington, for the use of said court, as may be necessary for their accommodation, unless it shall appear to the Speaker that such rooms cannot be appropriated without interfering with the business of Congress; and, in that event, the said court shall procure, at the city of Washington, such rooms as may be necessary for the convenient transaction of their business.

**SEC. 11. *And be it further enacted,*** That said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and have the use of all recorded and printed reports made by the committees of each house, when deemed to be necessary in the prosecution of the duties assigned by this act. Said court shall appoint a chief clerk, whose salary shall be two thousand dollars per annum, and an assistant clerk, if deemed necessary, whose salary shall be fifteen hundred dollars per annum, and a messenger, whose

salary shall be eight hundred dollars per annum, to be paid quarterly at the treasury. The said clerks shall be under the direction of said court in the performance of their duties, and for misconduct or incapacity may be removed from office by it; but, when so removed, said board [sic] shall make report thereof, with the cause of such removal, to Congress, if in session, or at the next session of Congress. Said clerk and assistant clerk shall take an oath for the faithful discharge of their duties: *Provided*, That the head of no department shall answer any call for information or papers if, in his opinion, it would be injurious to the public interest.

10. The Act of March 3, 1863, c. 92, 12 Stat. 765, entitled "An Act to amend 'An Act to establish a Court for the Investigation of Claims against the United States,' approved February twenty-fourth, eighteen hundred and fifty-five":

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there shall be appointed by the President, by and with the advice and consent of the Senate, two additional judges for the said court, to hold their offices during good behavior, who shall be qualified in the same manner, discharge the same duties, and receive the same compensation, as now provided in reference to the judges of said court; and that from the whole number of said judges the President shall in like manner appoint a chief justice for said court.

SEC. 2. *And be it further enacted*, That all petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, shall, unless otherwise ordered by res-

olution of the house in which the same are presented or introduced, be transmitted by the secretary of the Senate or the clerk of the House of Representatives, with all the accompanying documents, to the court aforesaid.

SEC. 3. *And be it further enacted*, That the said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the Government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it shall *under* [render] judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered upon the records of the same, and shall ipso facto become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein.

SEC. 4. *And be it further enacted*, That the said court of claims shall hold one annual session, commencing on the first Monday in October in each year, and continuing so long as may be necessary for the prompt disposition of the business of the court. The said court may prescribe rules and regulations for practice therein, and it may punish for contempt, in the manner prescribed by common law. It may appoint commissioners, and may generally exercise such powers as are necessary to carry out the powers herein granted to it. \* \* \* The judges and clerks of said court may administer oaths and affirmations, take acknowledgments

of instruments in writing, and give certificates of the same. Said court shall have a seal, with such device as it may order. Members of either house of Congress shall not practice in said court of claims.

SEC. 5. *And be it further enacted*, That either party may appeal to the supreme court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said supreme court may direct: *Provided*, That such appeal shall be taken within ninety days after the rendition of such judgment or decree: *And provided, further*, That when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the Government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the court of claims, the supreme court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy.

SEC. 6. *And be it further enacted*, That the solicitor, assistant solicitor, and deputy solicitor of said court, shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and it shall be their duty faithfully and diligently to defend the United States in all matters and cases before said court of claims; and in all cases taken by appeal therefrom to the supreme court; \* \* \*

SEC. 7. *And be it further enacted*, That in all cases of final judgments by said court, or on appeal by the said supreme court where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury

of a copy of said judgment, certified by the clerk of said court of claims, and signed by the chief justice, or, in his absence, by the presiding judge, of said court. And in cases where the judgment appealed from is in favor of said claimant, or the same is affirmed by the said supreme court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmation, unless presented for payment to the Secretary of the Treasury as aforesaid: *Provided*, That no interest shall be allowed on any claim up to the time of the rendition of the judgment by said court of claims, unless upon a contract expressly stipulating for the payment of interest, and it shall be the duty of the Secretary of the Treasury, at the commencement of each Congress, to include in his report or [a] statement of all sums paid at the treasury on such judgments, together with the names of the parties in whose favor the same were allowed: *And it is further provided*, That such payments shall be a full discharge to the United States of all claim or demand touching any of the matters involved in the controversy: *And provided further*, That any final judgment rendered against the claimant on any claim prosecuted as aforesaid shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

\* \* \* \* \*

SEC. 14. *And be it further enacted*, That no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

11. The Act of March 3, 1883, c. 116, 22 Stat. 485:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the house by which the case was transmitted for its consideration.

SEC. 2. That when a claim or matter is pending in any of the executive departments which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted for its guidance and action.

\* \* \* \* \*

## 12. The Act of March 3, 1887, c. 359, 24 Stat. 505 (Tucker Act):

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regu-

lation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.



13. The Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV), §§ 410(a), 412(a), 60 Stat. 842, 843-844:

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, \* \* \* sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. \* \* \*

\* \* \* \* \*

SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—

(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States: *Provided*, That the notice of appeal filed in the district court \* \* \* shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. \* \* \*

14. The Act of July 28, 1953, c. 253, § 1, 67 Stat. 226:

*Be it enacted by the Senate and House of Representatives of the United States of America*

*in Congress assembled,* That section 171 of title 28, United States Code, is amended by adding at the end thereof the following:

"Such court is hereby declared to be a court established under article III of the Constitution of the United States."

## APPENDIX B

### WAIVER OF SOVEREIGN IMMUNITY IN ANGLO-AMERICAN LAW PRIOR TO THE ADOPTION OF THE CONSTITUTION

#### I. ENGLISH PRACTICE

Long before 1787 it was a common practice in England for the sovereign to waive his immunity from suit and permit individuals to assert their claims against the Crown in the courts. The waiver of immunity was limited to particular types of claims and governed by special procedures. The development of these remedies against the Crown are traced by Holdsworth in his *History of English Law*, vol. IX, pp. 7-45, and may be summarized as follows:

It was recognized as early as the thirteenth century that the King was subject to the law and that, although ordinary writs did not lie against him in his courts, he was morally bound to do the same justice to his subjects as they could be compelled to do to one another. As yet, the methods by which the King could be approached were very informal (*id.* p. 10). A request or petition for justice to the King would often assume some of the characteristics of an ordinary action. Litigants would sometimes vouch the King to warranty as if he were a common person. But the procedure for obtaining redress by petition was becoming a more settled practice and developing characteristics very different from those in an ordinary action (*id.* p. 11).

From the fourteenth to the middle of the seventeenth century, the nature of a petition of right became fixed (*id.* p. 12). Petitions which asked for

something which the suppliant could claim as a right, if the claim were made against anyone but the King, were known as "petitions of right." Petitions which asked only for some favor to which the petitioner could have no legal claim were "petitions of grace" (*id.* pp. 13-14). Although the King could rightfully refuse to grant a petition of grace, he could not rightfully refuse to do what justice required when judgment had been rendered on a petition of right (*id.* p. 15).

The main use of the petition of right in the Middle Ages was to gain redress for wrongs which, if the case had been between subject and subject would have been redressed by some of the *real actions* (*id.* pp. 17-18). The real actions covered a much larger field than that covered by the land law at the present day. Many objects which would now be effected by the making of a contract, and many wrongs which would now be redressable by action in tort were attracted to the law of property and were redressable by real actions. For example, instead of making a contract to pay a sum of money, the men of the Middle Ages granted an annuity or a corody; and where we would bring an action on the case for a nuisance, they would bring an assize of nuisance, or an assize of novel disseisin, or *quod permittat*. In addition to the wide field of wrongs redressable by the real actions, a petition would lie for a chattel interest in land; and according to the better opinion for chattels personal (*id.* pp. 17-19).

While the petition of right did not lie for breach of contract, this was partly due to the fact that the law of contract was not yet fully developed, and partly to the fact that petitioners had alternative remedies (*id.* p. 21). Thus, a petition lay for omission to pay an annuity or a corody, because such a proceeding

was regarded as a proceeding to recover an incorporeal thing; and a judgment could be given against the King to give a recompense if he had failed in his duty to warrant the title of his grantee (*id.* p. 20). In the case of ordinary money claims, a petition to the King for a writ of liberate, ordering the Exchequer to pay, or for a direction that the barons of the Exchequer should hear the petitioner's claim, was an easier and more expeditious remedy. In the main, however, the chief use made of the petition of right in the Middle Ages was the redress of grievances which, as between subject and subject, would have been redressed by some one of the real actions (*id.* p. 21).

Other remedies than the petition of right arose against the Crown because of the great procedural defects attached to the use of a petition of right (*id.* p. 22). (1) There was a lengthy preliminary procedure before the legal question at issue could be brought before the court. The petition had to be endorsed "let right be done" (*id.* p. 16). A special commission was then issued by the Chancery to take an inquest to find the facts. If the facts were not found satisfactorily, a second commission might issue to find them again (*id.* p. 22). If they were found satisfactorily, it was sometimes necessary to put in a second petition to stir up the Crown to take the necessary step of answering the petitioner's plea and coming to an issue which could be heard on the common-law side of the Chancery, or sent into the King's Bench for trial (*id.* pp. 17, 22). In all cases begun by petition, the Crown could delay the petitioner by instituting a search for records which would support his title. (2) The Crown had many advantages in pleading. All conveyances and accounts which gave possession to the King had to be expressly stated in a

petition. At any time, the King could stop a proceeding by the issue of a writ *rege inconsulto*; and the judges could not then proceed without an order from the King. (3) When the petition of right turned upon a complaint redressable by a real action (which was usually the case), all the reasons which made real actions so dilatory applied to these proceedings. (4) The rule that a defendant could recover if he could show a better right than the tenant, did not apply to the King. To recover against the King, an absolute right had to be shown (*id.* p. 23).

The procedural difficulties outlined above gave rise to the remedies by traverse and *monstrans de droit*. The procedure by traverse arose as follows: One of the most usual ways in which the King secured possession of chattels or lands belonging to a subject was by the holding of an inquisition on the death of his tenant, or on the attainer or lunacy of any person. When the inquest found that the subject was possessed of certain property, this was seized by the King, who was then said to be entitled by office found. As a general rule, anyone whose right was set aside by this finding, *e.g.*, a person who had been disseised by the tenant or lunatic, was left to his remedy by petition. In a few cases, however, the law allowed a person aggrieved to traverse, if he could, the facts found by the office entitling the King to possession (*id.* p. 24). The number of these cases was at first very small, but was increased by statute in 1360 and again in 1362. This latter statute also established the remedy of *monstrans de droit*, which allowed the subject in certain cases to confess the title found for the King and avoid it by showing his own right (*id.* p. 25). This statute was construed liberally and was further extended by an Act of 1548 (*id.* p. 26).

These remedies had three main advantages over the petition of right: (1) They cut out all the preliminary stages of procedure attached to the petition of right—the presentation of the petition, the issue of a special commission, searches for evidence for the King. (2) It was not necessary to get the King's special permission to go on with the hearing of the case. (3) The remedy of *monstrans de droit* substituted for an inquiry at large into the title of the parties an inquiry into a specific defect in the office (*id.* p. 26).

The new remedies also had their disadvantages, (1) A party could not take advantage of a traverse unless the King had taken possession by an office found. Similarly, in order to take advantage of a *monstrans de droit*, he must have gotten seisin by office found, or in some other way which could not be traversed; and the subject must be able to confess the King's right and avoid it by showing his own right. (2) If the King was entitled, not only by the office found, but by another title of record, the subject could not until 1548 traverse or confess and avoid both (*id.* p. 27). (3) The analogy of the case where a disseisee's right of entry was tolled and turned to a right of action was applied to determine the question whether a complainant could sue by *monstrans* or petition of right (*id.* p. 28). Were it not for these limitations, the remedies of traverse and *monstrans de droit* would have completely superseded the petition.

In addition to these two new remedies, extended powers of relief against the Crown became available to the subject in the new Courts of Augmentations, Wards, and Surveyors, which were created by statute in the reign of Henry VIII and subsequently merged into the Court of Exchequer (*id.* p. 29). While these

courts were primarily administrative departments for the management on business lines of a vast quantity of property, they were given judicial powers which were very likely to be used when the Crown itself was a party. The Court of Augmentations, erected by statute in 1536, served partly as a department of audit, partly as an estate office, and partly as a franchise court to deal with the vast quantity of land confiscated from monasteries. The Court of Wards, created in 1540, was similarly constituted to manage the ancient feudal revenues of the Crown and especially to enforce the rights of wardship and marriage. The jurisdiction of these courts and the Court of Surveyors was varied many times by statute, copies of which are not all available.<sup>1</sup> Generally speaking, it seems that these financial courts entertained claims with respect to the particular property turned over to such courts for administration (*id.* p. 30).<sup>2</sup>

From 1615 to the first part of the nineteenth century, there appear to be no reported cases based upon the petition of right.<sup>3</sup> However, during this period, several new remedies emerged for securing relief against the Crown.

*Equitable relief.*—In the case of *Pawlett v. Attorney General*, Hardres, 465 (1668), it was first clearly recognized that the subject was entitled to equitable relief against the Crown. In that case the plaintiff had mortgaged property to a mortgagee.

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<sup>1</sup> Plucknett, *A Concise History of the Common Law* (3d ed.), p. 158.

<sup>2</sup> For example, the statute of 1541 (33 Henry VIII, c. 39), creating the Court of Surveyors, authorized the Court of Augmentations to determine claims by patentees against the King for defects in the interests which the King had purported to transfer to them.

<sup>3</sup> Ehrlich, *Petitions of Right*, 45 L. Q. Rev. 60, 61, 62 (1929).

The legal estate had descended to the mortgagee's heir, who had been attainted of treason. The King had therefore seized his property. The plaintiff brought his bill in the Exchequer against the Attorney General for redemption. In finding for the plaintiff, the court rejected the argument that the plaintiff could only proceed by petition to the King. Chief Baron Hale based his decision on the ground that the Exchequer had jurisdiction in the matter as inheritor of the powers of the Courts of Augmentations and Surveyors. Atkyns, B. put the jurisdiction on a much broader basis, but his view was not accepted until after the eighteenth century. For some time the jurisdiction to give equitable relief against the Crown was supposed to be peculiar to the Court of Exchequer \* (*id.* p. 30).

*Petition to the barons.*—Another remedy against the Crown arose out of the celebrated *Bankers' Case*, 14 S. T. 1 (1690–1700). In return for certain loans, Charles II granted to the Bankers annuities charged on the hereditary excise. After 1683, payments were in arrears, and after the Revolution, the Bankers presented a petition to the barons of the Exchequer for payment of the amounts due to them. The case turned on whether this was a proper method of procedure for asserting such a claim, and the House of Lords held in the affirmative. All the judges were of the opinion that the Bankers could also have proceeded by petition of right. This case was of considerable influence in the revival of the petition of right during the nineteenth century (*id.* pp. 32–33). As a result of the *Bankers' Case*, the subject could now not

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\* Citing *Reeve v. Attorney General*, 2 Atkyns 223 (1741); *Burgess v. Wheate*, 1 Eden 177, 255–256 (1757–1759); Bl. Comm., iii, 428–429.

only petition for a writ of liberate, but also petition the barons of the Exchequer for relief (*id.* p. 35).

Thus, the study by Holdsworth shows that there had developed a number of judicial procedures in England for asserting claims against the sovereign, including (1) the petition of right, (2) traverse of office found, (3) *monstrans de droit*, (4) writ of liberate, (5) petition to the barons of the Exchequer, and (6) bill against the Attorney General for equitable relief in the Court of Exchequer. Accordingly the practice of waiving the sovereign's immunity from suit was well known to English law long before the adoption of the Constitution in this country.

## II. AMERICAN PRACTICE

1. According to the Virginia Court of Appeals, "it has ever been the cherished policy of Virginia to allow her citizens and others the largest liberty of suit against herself; and there never has been a moment since October 1778 (but two years and three months after she became an independent state) that all persons have not enjoyed this right by express statute." *Higginbotham's Executrix v. Commonwealth*, 66 Va. 627, 637 (1874). The statute here referred to was an Act of 1778<sup>9</sup> establishing a Board of Auditors for public accounts, and including the following provision:

V. Where the auditors acting according to their discretion and judgment shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the high court of chancery or the general court, according to the nature of his case, for redress, and such court shall proceed to do

<sup>9</sup>9 Henings, *Statutes at Large*, p. 540.

right thereon; and a like petition shall be allowed in all other cases to any other person who is entitled to demand against the commonwealth any right in law or equity.

An exception to this Act seems to have been adopted in the case of impressed property, for, by an Act of November 1781,<sup>\*</sup> the county courts were empowered to receive claims against the public for impressed property, for the purpose of ascertaining the value of the property and then submitting to the legislature a report and a transcript of the proceedings. However, even with respect to impressed property, there is a reported case in which the legislature referred the claimant back to the courts, and he succeeded in securing a judgment in his favor.

In *Commonwealth v. Cunningham & Co.*, 8 Va. 331 (1793), the owner of a vessel impressed during the Revolutionary War presented his claim to the county court and in 1784 secured a certificate covering its value. When the auditor refused to honor the certificate, the claimant applied to the legislature, which referred him back to the judiciary. A judgment in his favor in the district court was affirmed by the Court of Appeals. The opinion of the court was written by Judge Pendleton, who had been President of the Virginia Convention elected to consider the Constitution and who had employed his influence to obtain its ratification.<sup>\*\*</sup> The report of the case shows that the claimant was represented by "Marshall." No doubt this was John Marshall, for Beveridge states (2 Beveridge, *Life of Marshall*, p. 177) that from 1790 until 1799 Marshall argued 113 cases decided by the

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\* 10 Henings, *Statutes at Large*, p. 468: "An Act for adjusting claims for property impressed or taken for public services."

\*\* 8 Va. vii.

Court of Appeals, and appeared in practically every important case handled by that tribunal.

2. In Maryland, the legislature, on January 20, 1787, adopted the following statute "to provide a remedy for creditors and others against the state":

Whereas individuals may have claims against this state for money, which they cannot settle and adjust with the auditor-general, and it is reasonable that some mode should be adopted to afford such individuals an opportunity of trying the justice of their claims at law;

*II. Be it enacted, by the General Assembly of Maryland,* That any citizen of this state, having any claim against this state for money, may commence and prosecute his action at law for the same against this state as defendant, by issuing a summons directed to the attorney-general, and sending with such summons a short note expressing the cause of action, and such person may declare, that the state is indebted unto him in any sum he thinks proper, and the attorney-general shall plead thereto, and the issue shall be made up, and the jury shall try such issue or issues, and if they find for the plaintiff, they may assess such damages as they may think just, and the same shall be paid by the state, and with costs, if the jury find more due to the plaintiff than admitted by the auditor, but if the jury find for the state, the plaintiff shall pay costs of suit, and be liable to execution therefor; and the attorney-general shall exhibit the claim of the state, if any, and if the jury shall find that the plaintiff is indebted to the state, they may find accordingly, and judgment may thereupon be entered and given against him for such sum and costs of suit, and such plaintiff may appeal in the same manner as private persons can by law appeal in suits between them, on giving bond with security, and the attorney-general may also appeal if he thinks proper.

III. *And be it enacted*, That where any person shall file a bill in chancery against the state, that process shall and may be served on the attorney-general, which service shall be effectual to all intents and purposes, according to the notice of the process issued; provided, that where any injunction is prayed to stay proceedings at law for the payment of any debt claimed by the state, the chancellor shall not order such injunction on the affidavit of the complainant only, but shall be fully satisfied by other proof, that the material facts in the complainant's bill are true.'

3. Under the Georgia Confiscation Act of 1778, forfeiting the estates of persons disloyal to the state during the revolution, all persons claiming any right or interest in a sequestered estate or pretending to be a creditor of the person attainted were to produce and exhibit their claims to a Board of Confiscation Commissioners in the county. The Attorney General was directed "to defend the right of the State, as well before the said boards, as in any of the Superior Courts against the same," and discontented claimants were given the right of appeal from the "determination" of the Board to the Superior Courts.<sup>8</sup> In accordance with this procedure, we find a report of the "Committee on Petitions" of the legislature in 1782 making the following recommendation:

No. 131 of Elizabeth Whitfield Setting forth that a Certain Lott of Land in the Town of Savannah Sold by the Commissioners of Confiscated Estates, Praying for the said Lott of Land. The Committee are of opinion it ought to be referred to a Court of Law; which was agreed to.<sup>9</sup>

<sup>8</sup> Kilty, *Laws of Maryland*, c. LIII.

<sup>9</sup> *Revolutionary Records of the State of Georgia* (compiled by Allen D. Candler, Atlanta, 1908), vol. 1, pp. 334, 341-342.

<sup>9</sup> *Op cit.*, vol. 3, p. 409.

4. Under the New Jersey Confiscation Act of April 18, 1778, the procedure to recover lands improperly seized by the state was in some respects similar to the remedy of traverse of office developed in England. The Commissioners appointed pursuant to the Act were to "make return" to a justice of the peace in the county, of the name and place of late abode of each person "whose Personal Estate and Effects the said Commissioners \* \* \* have seized" and to demand a precept for the summoning of a jury to inquire whether the named person was an offender within the meaning of the Act. After an inquisition by a jury, the justice of the peace was to certify the inquisition and make return to the next Inferior Court of Common Pleas. If the jury found the person to be an offender, a proclamation was to be made in open court to the effect that the "Person against whom such inquisition hath been found or any Person on his Behalf, or who shall think himself interested in the Premises" might appear and traverse the inquisition. Upon the filing of a bond, the traverse was to "be received and a Trial thereon awarded." If no person appeared to traverse the inquisition, the commissioners were to publish the effect of the proclamation within thirty days, after which another opportunity to traverse was to be provided. Should there then be no appearance, the inquisition was to be taken as true and final judgment in favor of the state.<sup>10</sup>

5. Under the North Carolina Confiscation Act of 1779, establishing Boards of Commissioners in each county to administer and sell the estates declared forfeited by the Act, it was provided "that if it shall

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<sup>10</sup> *Acts of the Council and General Assembly of the State of New Jersey (1776-1783)*, compiled by Peter Wilson, Trenton (1784), printed by Isaac Collins, pp. 43-46.

appear to any County Court that any Person \* \* \* has or pretends to have any Right of Title in Law" to any of the property declared forfeited by the Act, "such Court shall stay all further proceedings of the Commissioners thereupon, and shall send up a true and exact State of such Claim to the Superior Court of the District," which was then to "determine the Legal Right and Title of the Person so claiming, by Jury in the same Manner as in Suits at Common Law, and such Determination when had shall be final \* \* \*."<sup>11</sup> By a later act, of 1781, further effort was made to protect the property of "innocent persons" by providing that the county courts were to "make inquiry" to determine what persons "in the opinion of the court" had forfeited their property, and were then to furnish copies of such proceedings to the commissioners of confiscated property. Seemingly, aggrieved persons might institute a proceeding for the return of their property, for the statute expressly provided that the county courts were "empowered at any time to re-consider" their determinations, and "if necessary, to order the property returned to the owners."<sup>12</sup>

6. Delaware clearly recognized that its immunity from suit might be waived, for Article I, Section 9, of its constitution of 1792 provided that: "\* \* \* Suits may be brought against the State, according to such regulations as shall be made by law."<sup>13</sup> Earlier, under the statutes confiscating the property of persons disloyal to the State during the Revolutionary War,

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<sup>11</sup> *State Records of North Carolina*, edited by Walter Clark, Goldsboro, N.C. (1905), vol. 24, p. 212.

<sup>12</sup> *Id.*, p. 398.

<sup>13</sup> *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America*, H. Doc. 357, 59th Cong., 2d sess., vol. 1, pp. 568, 569.

the courts had played a significant role in adjudicating claims of wrongful seizure and claims by creditors. By the Act of June 5, 1779, it was provided "That the Justices of the Court of Common Pleas in each county" were "to receive the claims and order the trials respecting the title of any \* \* \* lands \* \* \* sold" by virtue of the Act "and claimed by any person \* \* \*." A jury of twelve was to be summoned "to hear, try and determine" such claims and its verdict was to be "final and conclusive to all parties without further appeal."<sup>14</sup>

7. There is some evidence that the judiciary of Connecticut participated in the settlement of claims against the State. This evidence is found in the Act of January 1789, which provided:

That from and after the first Day of March next, *all Demands against this State, not first liquidated and allowed by the General Assembly, or by the Governor and Council, or House of Representatives, or Supreme Court of Errors, or by the Superior Court, or by a Court of Common Pleas*, by Virtue of some express Law; shall be liquidated and settled by the Comptroller, who shall give Orders on the Treasurer, for the Balances, by him found and allowed, before the Treasurer shall pay the same; any Thing in said Act notwithstanding.<sup>15</sup> [Italics supplied.]

<sup>14</sup> *Laws of the State of Delaware* (1700-1797), printed by Samuel and John Adams, New Castle (1797), vol. 2, pp. 658-659.

<sup>15</sup> *Acts and Laws, Made and Passed by the General Court or Assembly of the State of Connecticut, in America; holden at New Haven (by Adjournment) on the first Thursday of January 1789* (New London; printed by T. Green and Son), pp. 375-376.

## APPENDIX C

### EXCERPTS FROM WRITINGS AND DEBATES ON THE FEDERAL CONSTITUTION

I. Comments on the provision of Article III extending the judicial power "to Controversies between a State and Citizens of another State":

1. *Alexander Hamilton (The Federalist, No. 81 (1914 ed., vol. II, pp. 125-126)):*

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be

enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable. [Emphasis in original.]

2. *John Marshall* (Elliot's *Debates* (2d ed.), vol. III, pp. 555-556):

With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be a partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals? [Emphasis in original.]

*3. James Madison* (Elliot's *Debates* (2d ed.), vol. III, p. 533) :

Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

*4. Patrick Henry* (Elliot's *Debates* (2d ed.), vol. III, pp. 543-544) :

As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construction they please on it. What! is justice to be done to one party, and not to the other? If gentlemen take this liberty now, what will they not do when our rights and liberties are in their power? He said it was necessary to provide a tribunal when the case happened, though it would happen but seldom. The power is necessary, because New York could not, before the war, collect money from Connecticut! The

state judiciaries are so degraded that they cannot be trusted. This is a dangerous power which is thus instituted. For what? For things which will seldom happen; and yet because there is a possibility that the strong, energetic government may want it, it shall be produced and thrown in the general scale of power. I confess I think it dangerous. Is it not the first time, among civilized mankind, that there was a tribunal to try disputes between the aggregate society and foreign nations? Is there any precedent for a tribunal to try disputes between foreign nations and the states of America? The honorable gentleman said that the consent of the parties was necessary: I say that a previous consent might leave it to arbitration. It is but a kind of arbitration at best.

## II. Comments on the provision of Article III extending the judicial power "to Controversies to which the United States shall be a Party":

1. *Luther Martin's letter to the legislature of Maryland* (*Elliot's Debates* (2d ed.), vol. I, pp. 344, 382) :

Thus, sir, in consequence of this appellate jurisdiction, and its extension to facts as well as to law, every arbitrary act of the general government, and every oppression of all that variety of officers appointed under its authority for the collection of taxes, duties, impost, excise, and other purposes, must be submitted to by the individual, or must be opposed with little prospect of success, and almost a certain prospect of ruin, at least in those cases where the middle and common class of citizens are interested. Since, to avoid that oppression, or to obtain redress, the application must be made to one of the courts of the United States,—by good fortune, should this application be in the first instance attended with success, and should damages be recovered equivalent to the injury sustained, an appeal lies to the Supreme Court,

in which case the citizen must at once give up his cause, or he must attend to it at the distance, perhaps, of more than a thousand miles from the place of his residence, and must take measures to procure before that court, on the appeal, all the evidence necessary to support his action, which, even if ultimately prosperous, must be attended with a loss of time, a neglect of business, and an expense, which will be greater than the original grievance, and to which men in moderate circumstances would be utterly unequal.

2. *George Nicholas*, at the Virginia Convention (Elliot's *Debates* (2d ed.), vol. III, pp. 476-477) :

\* \* \* But he supposes that Congress may be sued by those speculators. Where is the clause that gives that power? It gives no such power. This, according to my idea, is inconsistent. Can the supreme legislature be sued in their own subordinate courts, by their own citizens, in cases where they are not a party? They may be plaintiffs, but not defendants. \* \* \*

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U.S. Supreme Court, U.S.  
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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961.

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No. 242.

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THE GLIDDEN COMPANY, etc.,

*Petitioner,*

*vs.*

OLGA ZDANOK, *et al.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT.*

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**PETITIONER'S REPLY BRIEF.**

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## PETITIONER'S REPLY BRIEF.

Petitioner submits this brief in reply to the arguments contained in the briefs of respondents, the Government, and the judges of the Court of Claims.

### I

#### The Court of Claims is an Article I, not an Article III, Court.

This Court has held squarely that the Court of Claims is an Article I court. *Williams v. United States*, 289 U. S. 553. *Williams* was decided in 1933. Mr. Justice Sutherland wrote the unanimous opinion of this Court in which Mr. Chief Justice Hughes, Associate Justice Van Devanter, McReynolds, Brandeis, Butler, Stone, Roberts and Cardozo, joined.

It has been urged by respondents, the Government and the judges of the Court of Claims, that *Williams* should be overruled.<sup>1</sup>

It has been argued that the ruling in *Williams* was contrary to the view expressed by this Court in earlier cases, i.e., *United States v. Klein*, 80 U. S. 128 (1871); *United States v. Union Pacific R.R. Co.*, 98 U. S. 569 (1878); *Minnesota v. Hitchcock*, 185 U. S. 373 (1902); *Kansas v. United States*, 204 U. S. 331 (1907); *United States v. Louisiana*, 123 U. S. 32 (1887) and *Miles v. Graham*, 268 U. S. 501 (1925). These cases were referred to by Mr. Justice Sutherland in *Williams* at page 568 where he stated:

“None of these cases involved the question now under consideration, and the expressions were clearly *obiter dicta*, which, as said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399, ‘may be respected but ought not to control the judgment in a subsequent suit when the other point is presented for decision.’ ”

In none of these earlier cases was the question as to whether the Court of Claims is an Article I or an Article III court considered or mooted.

In no case prior to *Williams* did this Court specifically pass upon the question whether the Court of Claims is an Article I or Article III court. In *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929) this Court ruled that the United States Court of Customs and Patent Appeals was an Article I court. For the first time, in the unanimous opinion in that case, this Court discussed at length the status of the Court

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<sup>1</sup> In *Williams*, the Government argued successfully that the Court of Claims was an Article I court. See page 559 of 289 U. S. in *Williams* and pages 523, 524 of 289 U. S. in *O'Donoghue v. United States*.

of Claims, expressing its views that the Court of Claims was an Article I court.

Indeed, *Williams* has been referred to in later opinions of this Court as standing for the proposition that the Court of Claims is an Article I court and not an Article III court.

In *United States v. Sherwood*, 312 U. S. 584 (1941), Mr. Justice Stone, also in an unanimous opinion, referring to *Williams* and *Bakelite* stated at page 587

"The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power 'to pay the debts \*\*\* of the United States,' which it is free to exercise through judicial as well as non-judicial agencies."

The question presented there was whether or not a District Court had the jurisdiction to entertain a suit brought by a judgment creditor under the Tucker Act to recover damages from the United States for breach of its contract with the judgment debtor. It was held that the District Court could entertain jurisdiction of such suit.

In *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949), which involved the question as to whether or not a citizen of the District of Columbia had the standing of a citizen of one of the states of the United States so as to present a diversity of citizenship case in the District Court of Maryland, Mr. Justice Jackson with whom Mr. Justice Black and Mr. Justice Burton joined, relying upon *Williams*, stated at pages 592, 593:

"Congress is given power by Art. I to pay debts of the United States. That involves as an incident the determination of disputed claims. We have held unanimously that congressional authority under

Art. I, not the Art. III jurisdiction over suits to which the United States is a party, is the sole source of power to establish the Court of Claims and of the judicial power which that court exercises. *Williams v. United States*, 289 U. S. 553. In that decision we also noted that it is this same Art. I power that is conferred on district courts by the Tucker Act which authorizes them to hear and determine such claims in limited amounts. Since a legislative court such as the Court of Claims is 'incapable of receiving' Art. III judicial power, *American Insurance Co. v. Canter*, 1 Pet. 511, 546, it is clear that the power thus exercised by that court and concurrently by the district courts flows from Art. I, not Art. III. Indeed, more recently and again unanimously, this Court has said that by the Tucker Act the Congress authorized the district courts to sit as a court of claims exercising the same but no more judicial power. *United States v. Sherwood*, 312 U. S. 584, 591."

In a concurring opinion in *Tidewater*, Mr. Justice Rutledge with whom Mr. Justice Murphy agreed, referred to the fact that *Williams* and *O'Donoghue* were argued and decided at the same time in opinions written by the same Justice and that what was said in one was to be read in the light of what was said in the other, and stated at page 610:

"But *O'Donoghue* went further [than the proposition that Congress could not vest in constitutional courts outside the District of Columbia jurisdiction derived from the district clause of Article I], and in so doing undermined any implication in *Williams* that Article III courts outside the District could be vested with any form of non-Article III jurisdiction, when it pointed out that no courts of the District of Columbia could be granted 'administrative and other jurisdiction,' if, 'in creating and defining the juris-

diction of the courts of the District, Congress were limited to Art. III, as it is in dealing with other federal courts \* \* \* \* 289 U. S. at 546. Moreover, the Justices who dissented from the *O'Donoghue* rationale of dual jurisdiction expressed no disagreement with the *Williams* opinion."

Mr. Chief Justice Vinson with whom Mr. Justice Douglas joined, dissented in *Tidewater*, and referred to *Bakelite*, stating at page 640:

"Whether a court is of one category or the other depends upon what power of Congress was utilized in its creation. If it was the power to create inferior constitutional courts, the court may exercise only the judicial power outlined in Art. III. If Congress creates a judicial body to implement another of its constitutional powers, that body is a legislative court and may exercise none of the judicial power of Art. III."

And at page 640-641:

"We have held that the answer to the question whether the court is of one kind or another 'lies in the power under which the court was created and in the jurisdiction conferred.' *Ex parte Bakelite Corp.*, *supra* at 459. I would adhere to that test."

The argument that the *Williams* case was erroneously decided because in the opinion of Mr. Justice Sutherland it was said that the clause of Article III "Controversies to which the United States shall be a Party" did not mean controversies to which the United States was a party defendant, is without merit. Mr. Chief Justice Vinson in a footnote in *Tidewater*, at pages 640, 641, referring to *Williams* as having held that the Court of Claims had been created pursuant to the power of Congress under Article I

to pay the debts of the United States and that the Court of Claims had powers and duties inconsistent with those of an Article III court, pointed out that the Court's consideration in *Williams* of the question whether "Controversies to which the United States shall be a Party" in Article III included suits against the United States, "was therefore unnecessary to the decision, since an affirmative answer would not have converted the Court of Claims into a constitutional court." He further pointed out that since the jurisdiction of the Court of Claims included claims against the United States arising under the Constitution and laws of the United States, it was clear that the Court of Claims exercised "parallel" jurisdiction with that of Article III courts over cases against the United States arising under the Constitution and the laws of the United States. He said quite correctly, it is submitted, that this pointed out the fact that the discussion in *Williams* of the phrase "Controversies to which the United States shall be a Party" was unnecessary to the *Williams* decision.

As further pointed out by Mr. Chief Justice Vinson<sup>2</sup>, the fact that the Court of Claims deals with controversies involving the interpretation of the Constitution and the laws of the United States is not determinative that the Court of Claims is an Article III court; the fact that some of the controversies referred to in Article III may be decided by the Court of Claims or any other court created by Congress, does not make the Court of Claims or any other body constituted by Congress, an Article III court. Petitioner submits, if that were not so, then the territorial courts, the Tax Court of the United States, the Interstate Commerce Commission, the National Labor Relations Board and a host of other courts, boards and agencies created by Congress or

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<sup>2</sup> See page 641 of *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949).

the executive in the performance of their powers and functions under Articles I and II of the Constitution, also would be Article III courts.

Petitioner submits that the doctrine of separation of powers, the preservation of which is one of the aims of the constitutional guarantees of life tenure and irreducible compensation attaching to judges of Article III courts, suggests that there be a test for determining whether a body constituted by the Congress to settle disputes is a court which is a part of the independent judicial branch and whose judges will therefore have the foregoing constitutional protections, or whether it is an agency of the Congress merely carrying out, by delegation, a power entrusted to the Congress by the Constitution.

In *Bakelite*, *supra*, at page 459, this Court said that "the true test lies in the power under which the court was created and in the jurisdiction conferred", and in *Williams*, at page 569, this Court stated, in part quoting from *Bakelite*, that "none of the matters made cognizable by the court [Court of Claims] inherently or necessarily requires judicial determination, but on the contrary 'all are matters which are susceptible of legislative and executive determination and can have no other save under and in conformity with permissive legislation by Congress.' "

Petitioner submits that (except possibly for the District of Columbia courts over which Congress has plenary power) this Court in *Bakelite* and in *Williams* indicated a test as follows: (1) A tribunal which performs the stated powers and functions which may be performed by Congress under Article I must be an Article I or legislative court for Congress may not delegate legislative powers and functions to an Article III court; (2) A tribunal which performs the

stated powers and functions of determining the types of controversies enumerated in Article III which are not in the first instance disputes arising out of the stated powers and functions which may be exercised by Congress under Article I is an inferior court of the United States constituted under Article III, for Congress may not exercise any of the judicial power of the United States.

It has been urged in the briefs of respondents, the Government, and the judges of the Court of Claims, that the appellate jurisdiction exercisable by the Court of Claims, pursuant to Title 28 United States Code §1504, over judgments of the District Courts under the Federal Tort Claims Act is inconsistent with the Article I status of the Court of Claims. Petitioner submits that this appellate jurisdiction of the Court of Claims stands on the same footing with its original jurisdiction over other claims against the United States, since such tort claims are matters susceptible to determination by Congress under its power and function under Article I to pay the debts of the United States.

It also has been urged by respondents, the Government, and the judges of the Court of Claims that any Article III court can perform non-judicial powers and functions. The Government and the judges of the Court of Claims urge that any Article III court may perform such powers and functions on a voluntary basis. This contention is contrary to the consistent view of this Court that an Article III court (other than courts of the District of Columbia) may not perform non-judicial powers and functions. *National Mutual Insurance Company v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949); *Williams v. United States*, 289 U. S. 553 (1933); *Muskrat v. United States*, 219 U. S. 346 (1911); *In re Sanborn*, 148 U. S. 222 (1893); *Gordon v. United States*, 117 U. S. 697 (1866); *United States v. Ferreira*, 54

U. S. 40 (1851); *Hayburn's Case*, 2 U. S. 409 (1792). In an attempt to avoid the impact of this rule reliance is made upon *O'Donoghue v. United States*, 289 U. S. 516 (1933) in which the Court held that the District of Columbia courts were Article III courts even though they performed certain non-judicial functions. It is urged by respondents, the Government, and the judges of the Court of Claims that the Court of Claims should be accorded the same dual status as the courts of the District. But *O'Donoghue* was specifically limited to the District of Columbia courts. The ruling there was that

"In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state. *Keller v. Potomac Elec. Co.*, 261 U. S. 428, 442-443. 'In other words,' this court there said, "it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and power of federal courts in the several States but with such authority as a State may confer on her courts. *Kendall v. United States*, 12 Pet. 524, 619.' " Page 545.

Earlier at page 539 Mr. Justice Sutherland also had stated

"Over this District Congress possesses 'the combined powers of a general and of a State government in all cases where legislation is possible.' \* \* \* The power conferred by Art. I, §8, cl. 17, is plenary; but it does not exclude, in respect of the District, the exercise by Congress of other appropriate powers conferred upon that body by the Constitution, or authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable."

The notion that the physical location of the Court of Claims in any way affects its jurisdiction, powers or functions of a court seems absurd. The Court of Claims has national jurisdiction and has no more special relationship to the District of Columbia than to the rest of the United States.

The Government and the judges of the Court of Claims further contend that the advisory functions of the Court of Claims are not inconsistent with its Article III status because even though, as such a court, it may not be required to advise Congress, it may nevertheless do so voluntarily. Such a position ignores the purpose and function of the doctrine of separation of powers, which is to prevent encroachment by any one of the three branches of government upon any of the others. An Article III Court may not exercise any of the powers and functions of the legislative or executive branches of government, whether such exercise is compulsory or permissive. This Court has struck down attempts by Congress to require or authorize one branch of government to perform the powers and functions of another branch of government. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935); *Muskrat v. United States*, 219 U. S. 346 (1911).

It has been suggested that if an Article III court may not perform non-judicial functions at least the judges of such courts as individuals may act in a non-judicial capacity. Under Title 28 U. S. Code §1492 the Court of Claims is required to act as a body in reporting to Congress and there is no provision for individual reports to Congress by individual members of that court.

The argument that the Court of Claims is an Article III court, as allegedly revealed by the 1854 Senate debates when

a bill establishing the court was under consideration, is not established from the records of those debates. One thing indisputably clear from those debates, however, is that the Court of Claims was created for the sole purpose of performing the powers and functions of Congress in the payment of the debts of the United States and of relieving the Congress from the heavy burdens which were being placed upon it in connection with the presentation of claims against the United States and the consideration and disposition thereof by Congress. Conflicting views were expressed by the various members of the committee of Congress considering the establishment of the Court of Claims as to whether it should be composed of judges whose tenure of office should not be curtailed by Congress. The debates are not conclusive.

In any event, those debates, like the legislation of Congress in 1953 (§171 of Title 28 of United States Code) declaring the Court of Claims to be a court established under Article III of the Constitution of the United States, are at most expressions of intent whereas the only true test is what jurisdiction, powers and functions were and are to be performed by the Court of Claims. If a declaration of intent by Congress that a court is established as an Article III court is sufficient to establish that court as an Article III court, there would result a complete disregard of the powers, functions and jurisdiction granted to the court by Congress. The functions, powers and jurisdiction of a court as determined by an Article III court, determines whether a court is an Article I or Article III court, and not a declaration by Congress.<sup>3</sup> Otherwise Congress could declare the Inter-

<sup>3</sup> With reference to the contention by the Government that by the 1953 Act, Congress intended to "repudiate" this Court's ruling in *Williams* and to declare that the Court of Claims was established under Article III powers, it is interesting to refer to the

state Commerce Commission, the Tariff Commission, the National Labor Relations Board or the Tax Court of the United States and a host of other similar tribunals, to be Article III courts. The tests indicated by this Court to determine whether a court is an Article I or Article III court would be then reduced to a complete nullity.

The argument that Judge Madden has been an Article III judge at all times since his appointment and at least since 1953 because he possessed the qualifications of an Article III judge in that (1) he performed judicial duties; (2) that he enjoyed life tenure; and (3) that the amount of his compensation could not be diminished during his continuance in office, does not establish that the Court of Claims is an Article III court or that Judge Madden was an Article III judge. Of course Judge Madden possessed all of these qualifications prior to the enactment of the legislation in 1953. Each of these qualifications is subject to the statutory discretion of Congress and is not protected by any constitutional provision. Certainly it cannot be maintained, as argued by the Government, that Judge Madden acquired his status as an Article III judge independently and apart from the status of the Court of Claims. His status as a judge can be determined only by the status of the court of which he is a member.<sup>4</sup> It is the appointment to an Article III court which invests a person with the

remarks of Senator Gore during consideration of the proposed bill, (99 Cong. Rec., page 8944) :

"If in the future judges of the Court of Claims should refuse to act upon congressional reference cases on the grounds that they are not within the proper scope of jurisdiction of a constitutional court, I suppose the simple remedy will be for Congress to redesignate the Court of Claims as a legislative court."

<sup>4</sup> *Todd v. United States*, 158 U. S. 278, 284 (1895).

status of an Article III judge. The guaranty of tenure and compensation is provided for in Section 1 of Article III:

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The Government argues that Congress irrevocably gave up its theoretical power to reduce the tenure of office and compensation of judges of the Court of Claims in enacting the 1953 legislation. Of course, Congress is wholly without power to restrict or limit its own right to exercise power of legislation and one Congress may not restrict its own power or the power of its successors. It cannot enact irrepealable legislation and one legislative act is not binding on future legislatures. No principal of statutory construction is more firmly established. See, *Newton v. Commissioners*, 100 U. S. 548, 559 (1879).

It is clear that a judge of the Court of Claims does not have the power or the function to determine a controversy of the nature of the case before this Court and such lack of power or function existed both before and after the passage of the 1953 Act. The powers, functions and the jurisdiction of the Court of Claims were not enlarged by the 1953 legislation.

Again, the Government argues that the fact this Court reviews decisions of the Court of Claims which combined with statutory life tenure and irreducible compensation of its judges, results in making it (at some indeterminate stage of its history) an Article III court. *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 cited by the Government for this argument, does not support it. On the contrary, it is clear that reviewability

by Article III courts of the final decisions of a tribunal is not indicative of Article III status of that tribunal, since final decisions of a host of administrative agencies clearly not Article III courts, are likewise reviewable.

From the foregoing it is clear that the Court of Claims is an Article I court and that the judges of that court are without any constitutional guaranty with respect to tenure or compensation; that it was created to perform powers and functions of Congress under Article I and not for the purpose of performing the judicial power and functions of United States under Article III; and that the legislation of 1953 was ineffectual to alter the status of that court as an Article I court.

## II.

### **Judge Madden Was Not A *De Facto* Article III Court Judge.**

It has been argued that Judge Madden was at least a *de facto* judge of the Court of Appeals and that the petitioner cannot challenge his authority for the first time in its petition for certiorari.

Petitioner challenges the constitutional validity of the statute under which Judge Madden was designated and assigned to the Court of Appeals. Since this challenge is directed to the constitutional capacity of Judge Madden to sit as an Article III judge and to the jurisdiction of the court in which he sat as one of three judges, it is a challenge which can be raised at any time.<sup>5</sup> *McGrath v. Kristensen*, 340 U. S. 162, 167 (1950); *Gainesville v. Brown-Crummer*

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<sup>5</sup> The judges of the Court of Claims as *amici* in their brief in support of the petition on certiorari agreed. See page 5 of their brief.

*Inv. Co.*, 277 U. S. 54, 59 (1928); *Donegan v. Dyson*, 269 U. S. 49, 54-5 (1925).

Because the challenge to the capacity of Judge Madden to sit on the Court of Appeals was raised in the petition for certiorari, it is a direct challenge made in the course of the proceedings in this case. See, *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479 (1933). But even if the Court considers this constitutional challenge to be a collateral, it is properly before the Court. *Johnson, supra*, at p. 496; *Lamar v. United States*, 241 U. S. 103, 117 (1916).

Furthermore, it has been held that when a court lacks jurisdiction, jurisdiction cannot be waived by consent of the parties. *United States v. Corrick*, 298 U. S. 435, 440 (1936); *United States v. Emholt*, 105 U. S. 414, 416 (1881). Even if the parties should fail to raise the point of lack of jurisdiction of a court, the court is required "on its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act." *Mansfield & c., Railway Co. v. Swan*, 111 U. S. 379, 382 (1884); *King Bridge Company v. Otoe County*, 120 U. S. 225, 226 (1887).

Judge Madden was not appointed to an Article III court. He has not been vested with the power and function of an Article III judge, and he does not have the constitutional protection of Article III with respect to tenure and compensation; therefore he is not qualified to participate in a determination of the Court of Appeals, a court created under Article III. A judgment in which he participates is void and should be set aside.<sup>6</sup> *United States v. American-Foreign Steamship Corp.*, 363 U. S. 685, 691

<sup>6</sup> See page 5 of the brief of the judges of the Court of Claims as *amici* in support of the petition for certiorari.

(1960); *Ayrshire Collieries Corp. v. United States*, 331 U. S. 132, 141 (1947); *Frad v. Kelly*, 302 U. S. 312, 316-319 (1937); *American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 387 (1893).

In *American-Foreign Steamship Corp.*, a retired judge of the Court of Appeals for the Second Circuit sat during an *en banc* rehearing although the pertinent statute expressly limited *en banc* proceedings to the active judges of that Court. This Court as recently as last term, held the judgment rendered to be void because the participation of a judge who did not have the capacity to sit, prevented the court from exercising the jurisdiction granted by the statute. The *de facto* doctrine was not applied because a legislative mandate precluded the judge from participating in the *en banc* proceedings.

In the cases cited above, because a judge lacked *statutory* authority to sit, the judgment rendered was held to be void.

It must be conceded, therefore, that when a judge lacks *constitutional* authority to sit, as Judge Madden sitting in this case which only Article III judges could hear and determine, the court on which he sat was improperly constituted and the judgment rendered is void.<sup>7</sup>

Insofar as §§43(b) and 293(a) of Title 28 United States Code allow judges of the Court of Claims to sit on an Article III court, they are unconstitutional and void because they violate both Article III and Amendment V providing for due process. Since the challenge here is directed to the constitutional capacity of Judge Madden and to the jurisdiction of the court to which he was assigned, the *de facto* doctrine has no application here.

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<sup>7</sup> See footnote 6.

As stated by Mr. Justice Field in *Norton v. Shelby County*, 118 U. S. 425 (1886) at page 442,

"An unconstitutional act is not a law; it confers no rights; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Cases cited by respondents and the Government in support of their argument for the application of the *de facto* doctrine illustrate the fact that Judge Madden cannot be considered a *de facto* judge in this case. Those cases involved formal defects in compliance with the statutory procedure for assignment. Those cases did not involve situations where the defect was a constitutional lack of capacity of the judge to sit. See, *McDowell v. United States*, 159 U. S. 596 (1895); *Ball v. United States*, 140 U. S. 118 (1891); *Luhrig Collieries v. Interstate Coal & Dock Co.*, 287 F. 711 (2nd Cir. 1923); *United States v. Marachowsky*, 213 F. 2d 235 (7th Cir. 1954). Properly applied, the *de facto* doctrine stands for the proposition that when some mere formal defect exists in the regularity of the appointment or assignment of an officer such defect will not bar the good faith exercise of the office by one otherwise lawfully vested with the powers of office. *Leary v. United States*, 268 F. 2d 623, 627 (9th Cir. 1959).

Mr. Chief Justice Warren complied with the formalities of 28 U. S. C. §293(a) in designating and assigning Judge Madden to sit on the Court of Appeals.

The deficiency here is not a mere formal deficiency which may be remedied *nunc pro tunc*. See, *Leary v. United States*, *supra*. Judge Madden lacked the constitutional capacity to sit on an Article III court and the statute pursuant to which he was assigned is unconstitutional and void.

Judge Madden, in view of the foregoing, was not a *de facto* Article III court judge.

## III.

**Judge Madden's participation in the hearing and determination of the appeal in the Court of Appeals vitiated the determination of that court.**

Section 46 of Title 28 of the United States Code provides, in subsection (a) thereof, that "Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs"; and in subsection (b) that "In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges"; and in subsection (c) that "Cases and controversies shall be heard and determined by a court or division of not more than three judges"; and in subsection (d) that "A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c) shall constitute a quorum."

In this case the appeal was heard and determined by a court composed of three judges, including Judge Madden. As indicated hereinabove, Judge Madden was unqualified to sit as a member of the court. The two circuit judges disagreed. The determination of the Court of Appeals in these circumstances is vitiated and void. *Ayrshire Collieries Corp. v. United States*, 331 U. S. 132, 139 (1947).

### **Conclusion.**

The participation of Judge Madden of the United States Court of Appeals in the hearing and determination of this Article III case by the Court of Appeals for the Second Circuit vitiated the judgment and rendered it void.

It is submitted that this Court should remand this case  
for rehearing before a properly constituted court.

Respectfully submitted,

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Dated: New York, New York  
February 16, 1962

WILLIAM P. SMITH,  
THOMAS A. HOPKINS,  
LAMBROS J. LAMBROS,  
WHITE & CASE,

On the Brief.

# SUPREME COURT OF THE UNITED STATES

Nos. 242 AND 481.—OCTOBER TERM, 1961.

The Glidden Company, etc., Petitioner, 242                  v. Olga Zdanok et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
Benny Lurk, Petitioner, 481                  v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1962.]

MR. JUSTICE HARLAN announced the judgment of the Court and an opinion joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEWART.

In *Ex parte Bakelite Corp.*, 279 U. S. 438, and *Williams v. United States*, 289 U. S. 553, this Court held that the United States Court of Customs and Patent Appeals and the United States Court of Claims were neither confined in jurisdiction nor protected in independence by Article III of the Constitution, but that both had been created by virtue of other, substantive, powers possessed by Congress under Article I. The Congress has since pronounced its disagreement by providing as to each that "such court is hereby declared to be a court established under article III of the Constitution of the United States."<sup>1</sup> The petitioners in these cases invite us to

<sup>1</sup> Act of July 28, 1953, § 1, 67 Stat. 226, added to 28 U. S. C. § 171 (Court of Claims); Act of August 25, 1958, § 1, 72 Stat. 848, added to 28 U. S. C. § 211 (Court of Customs and Patent Appeals). See also Act of July 14, 1956, § 1, 70 Stat. 532, added to 28 U. S. C. § 251 (Customs Court).

reaffirm the authority of our earlier decisions, and thus hold for naught these congressional pronouncements, at least as sought to be applied to judges appointed prior to their enactment.

No. 242 is a suit brought by individual employees in a New York state court to recover damages for breach of a collective bargaining agreement, and removed to the Federal District Court for the Southern District of New York by the defendant employer on the ground of diversity of citizenship. The employees' right to recover was sustained by a divided panel of the Court of Appeals, in an opinion by Judge J. Warren Madden, then an active judge of the Court of Claims sitting by designation of the Chief Justice of the United States under 28 U. S. C. § 293 (a).<sup>2</sup> No. 481 is a criminal prosecution instituted in the United States District Court for the District of Columbia and resulting in a conviction for armed robbery. The trial was presided over by Judge Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals sitting by similar designation.<sup>3</sup> The petitioner's application for leave to appeal to the Court of Appeals *in forma pauperis*, respecting the validity of this designation and alleged trial errors, was upheld by this Court last Term, 366 U. S. 712; we are now asked to review the Court of Appeals' affirmance of his conviction. Because of the significance of the "designation" issue for the federal judicial system, we granted certiorari in the two cases, 368 U. S. 814, 815, limited to the question whether

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<sup>2</sup> "The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals . . . to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises."

<sup>3</sup> 28 U. S. C. § 294 (d) authorizes assignment of a retired judge from either court, to "perform such judicial duties as he is willing and able to undertake" in any circuit.

the judgment in either was vitiated by the respective participation of the judges named.<sup>4</sup>

The claim advanced by the petitioners, that they were denied the protection of judges with tenure and compensation guaranteed by Article III, has nothing to do with the manner in which either of these judges conducted himself in these proceedings. No contention is made that either Judge Madden or Judge Jackson displayed a lack of appropriate judicial independence, or that either sought by his rulings to curry favor with Congress or the Executive. Both indeed enjoy statutory assurance of tenure and compensation,<sup>5</sup> and were it not for the explicit provisions of Article III we should be quite unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings.

Article III, § 1, however, is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record. It provides:

“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>6</sup>

<sup>4</sup> The petition in No. 481 sought certiorari only as to that issue.

<sup>5</sup> 10 Stat. 612 (1855), as amended, 28 U. S. C. § 173 (Court of Claims); 46 Stat. 590, 762 (1930), as amended, 28 U. S. C. § 213 (Court of Customs and Patent Appeals). Judge Madden was appointed in 1941, Brief for Petitioner in No. 242, pp. 7-8, and retired in 1961, 290 F. 2d xvi; Judge Jackson was appointed in 1937, Brief for Petitioner in No. 481, pp. 9-10, and retired in 1952, 193 F. 2d xv.

<sup>6</sup> The bearing of § 2 of Art. III on petitioners' claims is discussed later. *Infra*, p. 32-53.

Apart from this provision, it is settled that neither the tenure nor salary of federal officers is constitutionally protected from impairment by Congress. *Crenshaw v. United States*, 134 U. S. 99, 107-108; cf. *Butler v. Pennsylvania*, 10 How. 402, 416-418. The statutory declaration, therefore, that the judges of these two courts should serve during good behavior and with undiminished salary, see note 5, *supra*, was ineffective to bind any subsequent Congress unless those judges were invested at appointment with the protections of Article III. *United States v. Fisher*, 109 U. S. 143, 145; see *McAllister v. United States*, 141 U. S. 174, 186. And the petitioners naturally point to the *Bakelite* and *Williams* cases, *supra*, as establishing that no such constitutional protection was in fact conferred.

The distinction referred to in those cases between "constitutional" and "legislative" courts has been productive of much confusion and controversy. Because of the highly theoretical nature of the problem in its present context,<sup>7</sup> we would be well advised to decide these cases on narrower grounds if any are fairly available. But for reasons that follow, we find ourselves unable to do so.

## I.

No challenge to the authority of the judges was filed in the course of the proceedings before them in either case. The Solicitor General, who submitted briefs and arguments for the United States as an intervening party under 28 U. S. C. § 2403, has seized upon this circumstance to suggest that the petitioners should be precluded by the

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<sup>7</sup> The abstractness of the present controversy is graphically demonstrated by the disparity in volume between records and briefs. The records in both cases amount to but 66 pages of motions, opinions, and the like, with no relevant transcripts of proceedings, while the briefs extend to 533 pages exclusive of appendices.

so-called *de facto* doctrine from questioning the validity of these designations for the first time on appeal.

Whatever may be the rule when a judge's authority is challenged at the earliest practicable moment, as it was in *United States v. American-Foreign S. S. Corp.*, 363 U. S. 685, in other circumstances involving judicial authority this Court has described it as well settled "that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public." *McDowell v. United States*, 159 U. S. 596, 602. The rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware. Although a United States Attorney may be permitted on behalf of the public to upset an order issued upon defective authority, *Frad v. Kelly*, 302 U. S. 312, a private litigant ordinarily may not. *Ball v. United States*, 140 U. S. 118, 128-129.

The rule does not obtain, of course, when the alleged defect of authority operates also as a limitation on this Court's appellate jurisdiction. *Ayrshire Collieries Corp. v. United States*, 331 U. S. 132 (three-judge court); *United States v. Emholt*, 105 U. S. 414 (certificate of divided opinion). In other circumstances as well, when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as "jurisdictional" and agreed to consider it on direct review even though not raised at the earliest practicable opportunity. *E. g., American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 387-388.

*A fortiori* is this so when the challenge is based upon nonfrivolous constitutional grounds. In *McDowell v.*

*United States* itself, *supra*, at 598-599, the Court, while holding that any defect in statutory authorization for a particular intracircuit assignment was immunized from examination by the *de facto* doctrine, specifically passed upon and upheld the constitutional authority of Congress to provide for such an assignment. And in *Lamar v. United States*, 241 U. S. 103, 117-118, the claim that an intercircuit assignment violated the criminal venue restrictions of the Sixth Amendment and usurped the presidential appointing power under Art. II, § 2, was heard here and determined upon its merits, despite the fact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review.

The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. See *O'Donoghue v. United States*, 289 U. S. 516, 532-534. It should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of *res judicata*, that there be an end to litigation. At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and that is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers. So this Court has concluded on an analogous balance struck to protect against intruding federal jurisdiction into the area constitutionally reserved to the States: Whether diversity of citizenship exists may be questioned on direct review for the first time in this Court. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382; *City of Gainesville v. Brown-Crummer Investment Co.*, 277 U. S. 54, 59. We hold that it is similarly open to these petitioners to challenge the constitutional authority of the judges below.

## II.

The Court of Appeals for the District of Columbia found it unnecessary to reach the question whether Judge Jackson enjoyed constitutional security of tenure and compensation. It held that even if he did not, Congress might authorize his assignment to courts in the District of Columbia, by virtue of its power "To exercise exclusive Legislation in all Cases whatsoever" over the District. Art. I, § 8, cl. 17. The Solicitor General, in support of that ruling, argues here that because the criminal charge against petitioner Lurk was violation of a local statute, D. C. Code, 1961, § 22-2901, rather than of one national in application, its trial did not require the assignment of an Article III judge.

The question thus raised is itself of constitutional dimension, and one which we need not reach if an Article III judge was in fact assigned. In the companion case, No. 242, the necessity for such a judge is uncontested. The Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants.<sup>8</sup> Authority for the Federal Government to decide questions of state law exists only by virtue of the Diversity Clause in Article III. *Erie R. Co. v. Tompkins*, 304 U. S. 64; see *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 284. For this reason, the question whether Judge Madden enjoyed constitutional independence is inescapably presented. Since decision of that question involves considerations bearing directly upon the constitutional status of Judge Jackson,

<sup>8</sup> Under our limited writ of certiorari, 368 U. S. 814, we have no occasion to consider whether federal law was more appropriately the measure of the employer's obligation. Cf. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U. S. 95.

we deem it appropriate to dispose of both cases on the same grounds, without at present intimating any view as to the correctness of the holding below by the Court of Appeals for the District of Columbia.

### III.

The next question is whether the character of the judges who sat in these cases may be determined without reference to the character of the courts to which they were originally appointed. If it were plain that these judges were invested upon confirmation with Article III tenure and compensation, it would be unnecessary for present purposes to consider the constitutional status of the Court of Claims and the Court of Customs and Patent Appeals.

No such course, however, appears to be open. The statutes under which Judge Madden and Judge Jackson were appointed speak of service only on those courts. 28 U. S. C. §§ 171, 211. They were not, as were the judges selected for the late Commerce Court, appointed as "additional circuit judges," Act of June 18, 1910, c. 309, 36 Stat. 539, 540, whose tenure might be constitutionally secured regardless of the fortunes of their courts. See 50 Cong. Rec. 5409-5418 (1913); *Donegan v. Dyson*, 269 U. S. 49; Frankfurter and Landis, *The Business of the Supreme Court* (1927), 168-173. It is true that at the time of Judge Jackson's appointment there was in force a statute authorizing assignment of Court of Customs and Patent Appeals judges to serve on the courts of the District of Columbia. Act of September 14, 1922, c. 306, § 5, 42 Stat. 837, 839. At that time, however, before the *O'Donoghue* decision, there seems to have been a consensus that the courts of the District were not confined or protected by Article III; as late as 1930, this Court regarded it as "recognized that the courts of the District of Columbia are not created under the judiciary article

of the Constitution but are legislative courts . . . ." *Federal Radio Comm'n v. General Electric Co.*, 281 U. S. 464, 468; and see Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 899-903 (1930). The 1922 Act cannot therefore be viewed *ex proprio vigore* as conferring Article III status on judges subsequently appointed to the Court of Customs and Patent Appeals.<sup>9</sup>

A more novel suggestion is that the assignment statute itself, 28 U. S. C. §§ 291-296, authorized the Chief Justice to appoint inferior Article III judges in the course of designating them for service on Article III courts.<sup>10</sup> See Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities under the Constitution*, 28 Mich. L. Rev. 485 (1930); cf. *Ex parte Siebold*, 100 U. S. 371, 397-398; *Rice v. Ames*, 180 U. S. 371, 378. But we need not consider the constitutional questions involved in this suggestion, for the statute does not readily lend itself to such a construction. If nothing else, the authority given the Chief Justice in 28 U. S. C. § 295 to revoke assignments previously made is wholly inconsistent with a reading of the statute as empowering him to appoint inferior Article III judges. Judges assigned by the Chief Justice who are not previously endowed with constitu-

<sup>9</sup> The debates and reports in Congress display no awareness of the problem. See H. R. Rep. No. 1152, 67th Cong., 2d Sess. (1922); 62 Cong. Rec. 190-191, 207-209 (1921).

<sup>10</sup> Article II, § 2, cl. 2 of the Constitution provides that the President

" . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

tional security of tenure and compensation thus can gain nothing by the designation.<sup>11</sup>

It is significant that Congress did not enact the present broad assignment statute until after it had declared the Court of Claims and the Court of Customs and Patent Appeals to be constitutional courts. Act of August 25, 1958, 72 Stat. 848. A major purpose of these declarations was to eliminate uncertainty whether regular Article III judges might be assigned to assist in the business of those courts when disability or disqualification made it difficult for them to obtain a quorum.<sup>12</sup> Those doubts, suggested by dicta in *Ex parte Bakelite Corp.*, 279 U. S. 438, 460, would be expanded rather than allayed were we to hold that the judges of the Court of Claims and the Court of Customs and Patent Appeals enjoy the protections of Article III while leaving at large the status of those courts. For these various reasons, the constitutional quality of tenure and compensation extended Judges Madden and Jackson at the time of their confirmation must be deemed to have depended upon the constitutional status of the courts to which they were primarily appointed.

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<sup>11</sup> Compare the statute creating the Emergency Court of Appeals, to consist of three or more judges "designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals." Act of January 30, 1942, c. 26, § 204 (c), 56 Stat. 23, 32.

<sup>12</sup> Hearings on H. R. 1070 before Subcommittee No. 2 of the House Committee on the Judiciary, pp. 6-7, 24 (Unpublished, May 19, 1953; on file with the Clerk of the Committee) (testimony of Judge Howell of the Court of Claims); H. R. Rep. No. 695, 83d Cong., 1st Sess. 2, 5-6 (1953); S. Rep. No. 275, 83d Cong., 1st Sess. 2 (1953); H. R. Rep. No. 2349, 85th Cong., 2d Sess. (1958); S. Rep. No. 2309, 85th Cong., 2d Sess. (1958); 104 Cong. Rec. 16095 (1958) (remarks of Representative Keating).

## IV.

In determining the constitutional character of the Court of Claims and the Court of Customs and Patent Appeals, as we are thus led to do, we may not disregard Congress' declaration that they were created under Article III. Of course, Congress may not by fiat overturn the constitutional decisions of this Court, but the legislative history of the 1953 and 1958 declarations makes plain that it was far from attempting any such thing. Typical is a statement in the 1958 House Report that the purpose of the legislation was to "declare which of the powers Congress was intending to exercise when the court was created." H. R. Rep. No. 2349, 85th Cong., 2d Sess. 3 (1958); accord, H. R. Rep. No. 695, 83d Cong., 1st Sess. 3, 5, 7 (1953); and see S. Rep. No. 275, 83d Cong., 1st Sess. 2 (1953), substituted for S. Rep. No. 261, 83d Cong., 1st Sess. 2 (1953); 99 Cong. Rec. 8943, 8944 (1953) (remarks of Senator Gore).

"Subsequent legislation which declares the intent of an earlier law," this Court has noted, "is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction." *Federal Housing Administration v. The Darlington, Inc.*, 358 U. S. 84, 90; accord, *New York, P. & N. R. Co. v. Peninsula Exchange*, 240 U. S. 34, 39. Especially is this so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion. *United States v. Hutcheson*, 312 U. S. 219, 235-237. As examination of the House and Senate Reports makes evident, that is what occurred here. E. g., S. Rep. No. 2309, 85th Cong., 2d Sess. 2-3 (1958); H. R. Rep. No. 695, 83d Cong., 1st Sess. 3-5 (1953).

At the time when *Bakelite* and *Williams* were decided, the Court did not have the benefit of this congressional understanding. The *Williams* case, for example, arose under the Legislative Appropriation Act of June 30, 1932, c. 314, § 107 (a)(5), 47 Stat. 382, 402, which reduced the salary of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." Mr. Justice Sutherland, who wrote the Court's opinions in both *Williams* and *O'Donoghue*, was painfully disadvantaged by the absence of congressional intimation as to which judges of which courts were to be deemed exempted. See *O'Donoghue v. United States*, 289 U. S. 516, 529.

In the *Bakelite* case, to be sure, Mr. Justice Van Devanter said of an argument drawn from tenuous evidence of congressional understanding that it "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U. S., at 459. Yet he would hardly have denied that explicit evidence of legislative intent concerning the factors he thought controlling may be relevant and indeed highly persuasive. In any event, the *Bakelite* dictum did not embarrass the Court in deciding *O'Donoghue*, where it looked searchingly at "congressional practice" to determine what classification that body "recognizes." 289 U. S., at 548-550. We think the forthright statement of understanding embraced in the 1953 and 1958 declarations may be taken as similarly persuasive evidence for the problem now before us.

To give due weight to these congressional declarations is not of course to compromise the authority or responsibility of this Court as the ultimate expositor of the Constitution. The *Bakelite* and *Williams* decisions have

long been considered of questionable soundness. See, e. g., Brown, *The Rent in Our Judicial Armor*, 10 G. W. L. Rev. 127 (1941); Hart and Wechsler, *The Federal Courts and the Federal System* (1953), 348-351; 1 Moore, *Federal Practice* (2d ed. 1961), 71 n. 21. They stand uneasily next to *O'Donoghue*, much of whose reasoning in sustaining the Article III status of the District of Columbia superior courts seems applicable to the Court of Claims and the Court of Customs and Patent Appeals. In *Pope v. United States*, 323 U. S. 1, 13-14, where the Solicitor General argued at length against the continued vitality of *Bakelite* and *Williams*, their authority was regarded as an open question.

Furthermore, apart from this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases, e. g., *United States v. South Buffalo R. Co.*, 333 U. S. 771, 774-775; see *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405-408 and nn. 1-3 (Brandeis, J., dissenting), there is the fact that Congress has acted on its understanding and has provided for assignment of judges who have made decisions that are now said to be impeachable. In these circumstances, the practical consideration underlying the doctrine of *stare decisis*—protection of generated expectations—actually militates in favor of reexamining the decisions. We are well-advised, therefore, to regard the questions decided in those cases as entirely open to reconsideration.

## V.

The Constitution nowhere makes reference to "legislative courts." The power given Congress in Art. I, § 8, cl. 9, "To constitute Tribunals inferior to the supreme Court," plainly relates to the "inferior Courts" provided for in Art. III, § 1; it has never been relied on for establishment of any other tribunals.

The concept of a legislative court derives from the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511, dealing with courts established in a territory. A cargo of cotton salvaged from a wreck off the coast of Florida had been purchased by Canter at a judicial sale ordered by a court at Key West invested by the territorial legislature with jurisdiction over cases of salvage. The insurers, to whom the property in the cargo had been abandoned by the owners, brought a libel for restitution, claiming in part that the prior decree was void because not rendered in a court created by Congress, as required for the exercise of admiralty jurisdiction under Article III. Chief Justice Marshall for the Court swept this objection aside by noting that the Superior Courts of Florida, which had been created by Congress, were staffed with judges appointed for only four years, and concluded that Article III did not apply in the territories:

"These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." 1 Pet., at 546.

By these arresting observations the Chief Justice certainly did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. Elsewhere in the opinion he distinctly referred to the provisions of Article III to show that it was such a case. 1 Pet., at 545. All the Chief

Justice meant, and what the case has ever after been taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article;<sup>13</sup> courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

The reasons for this are not difficult to appreciate so long as the character of the early territories and some of the practical problems arising from their administration are kept in mind. The entire governmental responsibility in a territory where there was no state government to assume the burden of local regulation devolved upon the National Government. This meant that courts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State.<sup>14</sup> But when the territories began entering into statehood, as they soon did, the authority of the territorial courts

<sup>13</sup> Far from being "incapable of receiving" federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so. *Benner v. Porter*, 9 How. 235, 243; *Clinton v. Engelbrecht*, 13 Wall. 434, 447; *Reynolds v. United States*, 98 U. S. 145, 154; *United States v. Coe*, 155 U. S. 76, 86; *Balzac v. Porto Rico*, 258 U. S. 298, 312-313; *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U. S. 237, 240-241; cf. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 338; see *Pope v. United States*, 323 U. S. 1, 13-14.

<sup>14</sup> Under *Barber v. Barber*, 21 How. 582, 584, for example, the federal courts in the States were incompetent to render divorces; but in the territories, where the legislative power of the United States of necessity extended to all such local matters, the territorial courts took cognizance of them. *Simms v. Simms*, 175 U. S. 162, 167-168; *De la Rama v. De la Rama*, 201 U. S. 303.

over matters of state concern ceased; and in a time when the size of the federal judiciary was still relatively small, that left the National Government with a significant number of territorial judges on its hands and no place to put them. When Florida was admitted as a State, for example, Congress replaced three territorial courts of general jurisdiction comprising five judges with one Federal District Court and one judge.<sup>15</sup>

At the same time as the absence of a federal structure in the territories produced problems not foreseen by the Framers of Article III, the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by that article. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto.<sup>16</sup> The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States, and the freedom of the territories to dispense with protections deemed inherent in a separation of governmental powers was as fully recognized.<sup>17</sup>

Against this historical background, it is hardly surprising that Chief Justice Marshall decided as he did. It would have been doctrinaire in the extreme to deny the

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<sup>15</sup> *Benner v. Porter*, 9 How. 235, 240, 244. For statutory techniques since developed to avoid the interregnal problems involved in that case, see *Metlakatla Indian Community v. Egan*, 363 U. S. 555, 557-559; 1 Moore, *Federal Practice* (2d ed. 1961), 32-34.

<sup>16</sup> See *Clinton v. Englebrecht*, 13 Wall. 434, 441-445; *Hornbuckle v. Toombs*, 18 Wall. 648, 655-656.

<sup>17</sup> Compare *Clinton v. Englebrecht*, *supra*, 13 Wall., at 446, 447, with *Dreyer v. Illinois*, 187 U. S. 71, 83-84.

right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee of tenure that Congress could not put to use and that the exigencies of the territories did not require. Marshall chose neither course; conscious as ever of his responsibility to see the Constitution work, he recognized a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system.

The same confluence of practical considerations that dictated the result in *Canter* has governed the decision in later cases sanctioning the creation of other courts with judges of limited tenure. In *United States v. Coe*, 155 U. S. 76, 85-86, for example, the Court sustained the authority of the Court of Private Land Claims to adjudicate claims under treaties to land in the territories, but left it expressly open whether such a course might be followed within the States. The Choctaw and Chickasaw Citizenship Court was similarly created to determine questions of tribal membership relevant to property claims within Indian territory under the exclusive control of the National Government. See *Stephens v. Cherokee Nation*, 174 U. S. 445; *Ex parte Joins*, 191 U. S. 93; *Wallace v. Adams*, 204 U. S. 415. Upon like considerations, Article III has been viewed as inapplicable to courts created in unincorporated territories outside the mainland, *Downes v. Bidwell*, 182 U. S. 244, 266-267; *Balzac v. Porto Rico*, 258 U. S. 298, 312-313; cf. *Dorr v. United States*, 195 U. S. 138, 145, 149, and to the consular courts established by concessions from foreign countries, *In re Ross*, 140 U. S. 453, 464-465, 480.<sup>18</sup>

<sup>18</sup> See generally, as to each of these courts, 1 Moore, Federal Practice (2d ed. 1961), 40-44, 47-50.

The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives. When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling. *O'Donoghue v. United States*, 289 U. S. 516, 536-539.

Since the conditions obtaining in one territory have been assumed to exist in each, this Court has in the past entertained a presumption that even those territorial judges who have been extended statutory assurances of life tenure and undiminished compensation have been so favored as a matter of legislative grace and not of constitutional compulsion. *McAllister v. United States*, 141 U. S. 174, 186.<sup>19</sup> By a parity of reasoning, however, the presumption should be reversed when Congress creates courts the continuing exercise of whose jurisdiction is unembarrassed by such practical difficulties. See *Mookini v. United States*, 303 U. S. 201, 205. As the *Bakelite* and *Williams* opinions recognize, the Court of Claims and the Court of Customs and Patent Appeals were created to carry into effect powers enjoyed by the National Government over subject matter—roughly, payment of debts and collection of customs revenue—and not over localities. What those opinions fail to deal with is whether that distinction deprives *American Insurance Co. v. Canter* of controlling force.

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<sup>19</sup> We do not now decide, of course, whether the same conditions still obtain in each of the present-day territories or whether, even if they do, Congress might not choose to establish an Article III court in one or more of them.

The *Bakelite* opinion did not inquire whether there might be such a distinction. After sketching the history of the territorial and consular courts, it continued at once:

"Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." 279 U. S., at 451.

Since in the Court's view the jurisdiction conferred on both the Court of Claims and the Court of Customs and Patent Appeals included "nothing which inherently or necessarily requires judicial determination,"<sup>20</sup> both could have been and were created as legislative courts.

We need not pause to assess the Court's characterization of the jurisdiction conferred on those courts, beyond indicating certain reservations about its accuracy.<sup>21</sup> Nor need we now explore the extent to which Congress may commit the execution of even "inherently" judicial business to tribunals other than Article III courts. We may and do assume, for present purposes, that none of the jurisdiction vested in our two courts is of that sort, so

<sup>20</sup> *Ex parte Bakelite Corp.*, 279 U. S. 438, 453, 458; accord, *Williams v. United States*, 289 U. S. 553, 579.

<sup>21</sup> *Williams* itself recognized that the jurisdiction conferred on the Court of Claims by the Tucker Act, now 28 U. S. C. § 1491, to award just compensation for a governmental taking, empowered that court to decide what had previously been described as a judicial and not a legislative question. 289 U. S., at 581; see, e. g., *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327. As for *Bakelite*, its reliance, 279 U. S., at 458 n. 26, on *Cary v. Curtis*, 3 How. 236, for the proposition that disputes over customs duties may be adjudged summarily without recourse to judicial proceedings, appears to have overlooked the care with which that decision specifically declined to rule whether all right of action might be taken away from a protestant, even going so far as to suggest several judicial remedies that might have been available. See 3 How., at 250.

that all of it might be committed for final determination to non-Article III tribunals, be they denominated legislative courts or administrative agencies.

But because Congress may employ such tribunals assuredly does not mean that it must. This is the crucial *non sequitur* of the *Bakelite* and *Williams* opinions. Each assumed that because Congress might have assigned specified jurisdiction to an administrative agency, it must be deemed to have done so even though it assigned that jurisdiction to a tribunal having every appearance of a court and composed of judges enjoying statutory assurances of life tenure and undiminished compensation. In so doing, each appears to have misunderstood the thrust of the celebrated observation by Mr. Justice Curtis, that

"... there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284.

This passage, cited in both the *Bakelite* and *Williams* opinions,<sup>22</sup> plainly did not mean that the matters referred to could not be entrusted to Article III courts. Quite the contrary, the explicit predicate to Justice Curtis' argument was that such courts could exercise judicial power over such cases. For the very statute whose authorization of summary distress proceedings was sustained in the *Murray* case, also authorized the distrainee to bring suit to arrest the levy against the United States in a Federal District Court. And as to this, the author of the opinion

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<sup>22</sup> 279 U. S., at 451 n. 8; 289 U. S., at 579.

stated, just before his more trenchant remark quoted above:

"The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court." <sup>23</sup>

Thus *Murray's Lessee*, far from furnishing authority against the proposition that the Court of Claims is a constitutional court, actually supports it.

To deny that Congress may create tribunals under Article III for the sole purpose of adjudicating matters that it might have reserved for legislative or executive decision would be to deprive it of the very choice that Mr. Justice Curtis insisted it enjoys. Of course possession of the choice, assuming it is coextensive with the range of matters confided to the courts,<sup>24</sup> subjects those courts to the continuous possibility that their entire jurisdiction may be withdrawn. See *Williams v. United States*, 289 U. S. 553, 580-581. But the threat thus facing their independence is not in kind or effect different from that sustained by all inferior federal courts. The great constitutional compromise that resulted in agreement upon Art. III, § 1, authorized but did not obligate Congress to create inferior federal courts. I Farrand, *The Records of the Federal Convention* (1911), 118, 124-125; *The Federalist*, No. 81 (Wright ed. 1961), at 509 (Hamilton). Once created, they passed almost a century without exercising any very significant jurisdiction. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 65-70 (1923); Frankfurter,

<sup>23</sup> 18 How., at 284.

<sup>24</sup> But see note 21, *supra*.

Distribution of Judicial Power Between United States and State Courts, 13 Cornell L. Q. 499 (1928). Throughout this period and beyond it up to today, they remained constantly subject to jurisdictional curtailment. *Turner v. Bank of North America*, 4 Dall. 8, 10 note (Chase, J.); *Cary v. Curtis*, 3 How. 236, 245; *Sheldon v. Sill*, 8 How. 441, 449; *Kline v. Burke Construction Co.*, 260 U. S. 226, 233-234. Even if it should be conceded that the Court of Claims or the Court of Customs and Patent Appeals is any more likely to be supplanted, we do not think the factor of constitutional significance.<sup>25</sup>

What has been said should suffice to demonstrate that whether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite. To ascertain whether the courts now under inquiry can meet those tests, we must turn to examine their history, the development of their functions, and their present characteristics.

## VI.

A. *Court of Claims*.—The Court of Claims was created by the Act of February 24, 1855, c. 122, 10 Stat. 612, primarily to relieve the pressure on Congress caused by the volume of private bills. As an innovation the court was at first regarded as an experiment, and some of its creators were reluctant to give it all the attributes of a court by making its judgments final; instead it was authorized to hear claims and report its findings of fact and opinions

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<sup>25</sup> See generally Hart and Wechsler, *The Federal Courts and the Federal System* (1953), 312-340, and more specifically, pp. 37-38, *infra*.

to Congress, together with drafts of bills designed to carry its recommendations into effect. § 7, 10 Stat. 613; see Cong. Globe, 33d Cong., 2d Sess. 70-72 (1854) (remarks of Senators Brodhead and Hunter). From the outset, however, a majority of the court's proponents insisted that its judges be given life tenure as a means of assuring independence of judgment, and their proposal won acceptance in the Act. § 1, 10 Stat. 612; see Cong. Globe, 33d Cong., 2d Sess. 71, 108-109 (Senator Hunter); 72 (Senator Clayton); 106 (Senator Brodhead); 110 (Senator Pratt); 114, 902 (the votes). Indeed there are substantial indications in the debates that Congress thought it was establishing a court under Article III. Cong. Globe, 33d Cong., 2d Sess. 108-109 (Senator Hunter); 110-111 (Senator Pratt); 111 (Senator Clayton); 113 (Senators Stuart and Douglas).

By the end of 1861, however, it was apparent that the limited powers conferred on the court were insufficient to relieve Congress from the laborious necessity of examining the merits of private bills. In his State of the Union message that year, President Lincoln recommended that the legislative design to provide for the independent adjudication of claims against the United States be brought to fruition by making the judgments of the Court of Claims final. The pertinent text of his address is as follows, Cong. Globe, 37th Cong., 2d Sess., Appendix, p. 2:

"It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department . . . . It was intended by the organization of the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable

means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final."

By the Act of March 3, 1863, c. 92, § 5, 12 Stat. 765, 766, Congress adopted the President's recommendation and made the court's judgments final, with appeal to the Supreme Court provided in certain cases. The significance of this nearly contemporaneous enactment for the light it sheds on the aims of the 1855 Congress is apparent.

There was one further impediment. Section 14 of the 1863 Act, 12 Stat. 768, provided that "no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." In *Gordon v. United States*, 2 Wall. 561, this Court refused to review a judgment of the Court of Claims because it construed that section as giving the Secretary a revisory authority over the court inconsistent with its exercise of judicial power. Congress promptly repealed the offensive section, Act of March 17, 1866, c. 19, § 1, 14 Stat. 9, once again exhibiting its purpose to liberate the Court of Claims from itself and the Executive. Thereafter, the Supreme Court promulgated rules governing appeals from the court, 3 Wall. vii-viii, and took jurisdiction under them for the first time in *DeGroot v. United States*, 5 Wall. 419.

The early appeals entertained by the Court furnish striking evidence of its understanding that the Court of Claims had been vested with judicial power. In *DeGroot* the court had been given jurisdiction by special bill only after the passage of two private bills had failed to produce agreement by administrative officials upon adequate recompense. This Court was thus presented with a vivid illustration of the ways in which the same matter might be submitted for resolution to a legislative committee, to

an executive officer, or to a court, *Murray's Lessee, supra*, and nevertheless accepted appellate jurisdiction over what was, necessarily, an exercise of the judicial power which alone it may review. *Marbury v. Madison*, 1 Cranch 137, 174-175.

After the repeal of § 14, the Court was quick to protect the Court of Claims' judgments from executive revision. In *United States v. O'Grady*, 22 Wall. 641, a judgment had been diminished by the Secretary of the Treasury in an amount equal to a tax assertedly due, although the United States had not pleaded a set-off as it was entitled by the 1863 Act to do.<sup>26</sup> The Court of Claims and this Court on appeal held the deduction unwarranted in law, with the following pertinent closing observation:

"Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for a new trial."<sup>27</sup>

Like views abound in the early reports. In *United States v. Union Pacific R. Co.*, 98 U. S. 569, 603, for example, referring to Article III, the Court said:

"Congress has, under this authority, created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution."

<sup>26</sup> § 3, 12 Stat. 765, now 28 U. S. C. § 1503. See also 18 Stat. 481 (1875), as amended, 31 U. S. C. § 227, requiring the Comptroller General to bring suit against a nonconsenting judgment creditor if that official believes a debt not previously asserted as a set-off is due the United States.

<sup>27</sup> 22 Wall., at 648.

Such remained the view of the Court as late as *Miles v. Graham*, 268 U. S. 501, decided in 1925. There it was held, on the authority of *Evans v. Gore*, 253 U. S. 245, that the salary of a Court of Claims judge appointed even after enactment of the taxing statute in question was not subject to such diminution. Although the case was afterwards overruled on this point, *O'Malley v. Woodrough*, 307 U. S. 277, 283, what is of continuing interest is the Court's reliance in *Miles* upon *Evans v. Gore*, where Mr. Justice Van Devanter for the Court devoted six full pages to recitation of the importance of the guarantees of tenure and salary contained in Article III.<sup>28</sup> How it was possible to say in *Bakelite*, 279 U. S., at 455, that the Court in *Miles*, decided only five years after *Evans* and with copious quotation from it, was unaware of the crucial question whether Article III extended its protection to a judge of the Court of Claims, is very difficult to understand.

In actuality, the Court's pre-*Bakelite* view of the Court of Claims is supported by the evidence of increasing confidence placed in that tribunal by Congress. The Tucker Act, § 1, 24 Stat. 505 (1887), now 28 U. S. C. § 1491, greatly expanded the jurisdiction of the court by authorizing it to adjudicate

"All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable . . . ."

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<sup>28</sup> *Evans v. Gore*, 253 U. S. 245, 248-254.

All of the cases within this grant of jurisdiction arise either immediately or potentially under federal law within the meaning of Art. III, § 2. *Osborn v. Bank of the United States*, 9 Wheat. 738, 818-819, 823-825; see *Clearfield Trust Co. v. United States*, 318 U. S. 363; *Federal Crop Insurance Corp. v. Merrill*, 332 U. S. 380; Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 184-196. The cases heard by the Court have been as intricate and far-ranging as any coming within the federal-question jurisdiction, 28 U. S. C. § 1331, of the District Courts. E. g., *Causby v. United States*, 104 Ct. Cls. 342, 60 F. Supp. 751, remanded for further findings, 328 U. S. 256 (eminent domain); *Lovett v. United States*, 104 Ct. Cls. 557, 66 F. Supp. 142, aff'd, 328 U. S. 303 (bill of attainder); *Shapiro v. United States*, 107 Ct. Cls. 650, 69 F. Supp. 205 (military due process). In none of these cases, nor in others, could it well be suggested that the Court of Claims had adjudged the issues, no matter how important to the Government, otherwise than dispassionately.

Indeed there is reason to believe that the Court of Claims has been constituted as it is precisely to the end that there may be a tribunal specially qualified to hold the Government to strict legal accounting. From the beginning it has been given jurisdiction only to award damages, not specific relief. *United States v. Aire*, 6 Wall. 573; *United States v. Jones*, 131 U. S. 1; see Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 123-126. No question can be raised of Congress' freedom, consistently with Article III, to impose such a limitation upon the remedial powers of a federal court. *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 330 (Norris-LaGuardia Act). But far from serving as a restriction, this limitation has allowed the Court of Claims a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action. See

*Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 703–704; *Malone v. Bowdoin*, 369 U. S. 643; Brenner, Judicial Review by Money Judgment in the Court of Claims, 21 Fed. B. J. 179 (1961).

"If there are such things as political axioms," said Alexander Hamilton, "the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number." *The Federalist*, No. 80 (Wright ed. 1961), at 500. His sentiments were not ignored by the Framers of Article III. The Randolph plan, which formed the basis of that article, called for establishment of a national judiciary coextensive in authority with the executive and legislative branches. IV Farrand, *The Records of the Federal Convention* (rev. ed. 1937), 47–48. For, as Hamilton observed, a chief defect of the Confederation had been ". . . the want of a judiciary power. Laws are a dead letter without courts to expound and define their meaning and operation." *The Federalist*, No. 22 (Wright ed. 1961), at 197. But because of the barrier of sovereign immunity, the laws controlling governmental rights and obligations could not for years obtain a fully definitive exposition. The creation of the Court of Claims can be viewed as a fulfillment of the design of Article III.

B. *The Court of Customs and Patent Appeals*.—The Court of Customs Appeals, as it was first known, was established by the Payne-Aldrich Tariff Act of August 5, 1909, c. 6, § 29, 36 Stat. 11, 105, to review by appeal final decisions of the Board of General Appraisers (now Customs Court) respecting the classification and rate of duty applicable to imported merchandise. The Act was silent about the tenure of the judges, as had been the Judiciary Act of 1789, c. 20, §§ 3, 4, 1 Stat. 73–75. The salary, first set at \$10,000, was afterwards lowered to the \$7,000 then being paid to circuit judges, Act of February 25, 1910, c. 62, § 1, 36 Stat. 202, 214, but before the first nomina-

tions had been received or confirmed, see 45 Cong. Rec. 2959, 4003 (1910); and, although it has since been increased, it has never been diminished.<sup>29</sup> After the *Bakelite* case had been decided, Congress expressly conferred tenure during good behavior upon the court's judges, in the Tariff Act of 1930, § 646, 46 Stat. 590, 762. Representative Chindblom, in supporting the measure, stated that "when this court was established it was believed to be a constitutional court [so] that it was not necessary to fix the term." 71 Cong. Rec. 2043 (1929).

The debates in the Senate at the time of the court's creation bear out this observation. See 44 Cong. Rec. 4185-4225 (1909). For under the Customs Administrative Act of 1890, c. 407, § 15, 26 Stat. 131, 138, review of decisions of the Board of General Appraisers had been vested in the Circuit Courts, undoubted Article III courts; it was this jurisdiction that was proposed to be transferred to the new court.<sup>30</sup> The debates accordingly concerned themselves with whether there was a need for

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<sup>29</sup> Under the Legislative Appropriation Act of June 30, 1932, c. 314, 47 Stat. 382—the statute under which the *Williams* and *O'Donoghue* cases arose—the judges of the Court of Customs and Patent Appeals accepted a reduction in salary from \$12,500 to \$10,000. That court had not, however, been specified for reduction by Congress; the action of the judges was understandable coming as it did after *Bakelite* had been decided; and under § 109 of the Act, 47 Stat. 403, the Treasury was authorized to accept reductions in payment voluntarily tendered by judges whose salary was constitutionally exempt from diminution.

<sup>30</sup> 36 Stat. 106. Provision was made for the transfer of pending cases and of appeals from final decisions in and of the Circuit Courts and Courts of Appeals. 36 Stat. 106, 107. The very first case heard by the Court of Customs Appeals was an appeal from the Circuit Court for the Southern District of New York. *Hansen v. United States*, 1 Ct. Cust. App. 1; it also took jurisdiction of a case transferred from the Court of Appeals for the Ninth Circuit in *United States v. Seattle Brewing & Malting Co.*, 1 Ct. Cust. App. 362.

a specialized court in the federal judicial system to deal with customs matters.

As was said some 35 years ago, "an important phase of the history of the federal judiciary deals with the movement for the establishment of tribunals whose business was to be limited to litigation arising from a restricted field of legislative control." Frankfurter and Landis, *The Business of the Supreme Court* (1927), 147. In certain areas of federal judicial business there has been a felt need to obtain, *first*, the special competence in complex, technical and important matters that comes from narrowly focused inquiry; *second*, the speedy resolution of controversies available on a docket unencumbered by other matters; and, *third*, the certainty and definition that come from nationwide uniformity of decision. See generally *id.*, at 146-186. Needs such as these provoked formation of the Commerce Court and the Emergency Court of Appeals. They also prompted establishment of the Court of Customs and Patent Appeals and its investiture with jurisdiction over customs, tariff, and patent and trademark litigation. 28 U. S. C. §§ 1541-1543.

The parallelism with the Commerce Court is especially striking. That court was created to exercise the jurisdiction previously held by the Circuit Courts to review orders of the Interstate Commerce Commission. Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 539. It was needed, so its sponsors believed, to afford uniform, expert, and expeditious judicial review. See President Taft's message to Congress, 45 Cong. Rec. 379 (1910), in the course of which he stated:

"Reasons precisely analogous to those which induced the Congress to create the court of customs appeals by the provisions in the tariff act of August 5, 1909, may be urged in support of the creation of the commerce court."

When disfavor with the court caused its abolition three years later, Act of October 22, 1913, c. 32, 38 Stat. 208, 219, it was decided in Congress after extensive debate that the judges then serving on it were protected in tenure by Article III, and they were thereafter assigned to sit on other constitutional courts. See, e.g., 48 Cong. Rec. 7994 (1912) (remarks of Senator Sutherland); and see *Dongan v. Dyson*, 269 U. S. 49.

The Emergency Court of Appeals was similarly created, by the Act of January 30, 1942, c. 26, 56 Stat. 23, to exercise exclusive equity jurisdiction to determine the validity of regulations, price schedules, and orders issued by the wartime Office of Price Administration.<sup>31</sup> Its Article III status was recognized in *Lockerty v. Phillips*, 319 U. S. 182, 187-188.

Of course the judges of those courts were appointed as judges of inferior federal courts generally, or drawn from among those previously appointed as such. See p. 8 and note 11, *supra*. But by 1942 at least, when the latter court was created, Congress was well aware of the doubt created by the *Bakelite* and *Williams* decisions whether Article III judges could sit on non-Article III tribunals. Its action in authorizing judges of the District Courts and Courts of Appeal to sit on the Emergency Court thus reflects its understanding that that court was being created under Article III.

Such an understanding parallels that of previous Congresses since the adoption of the Constitution. Congress has never been compelled to vest the entire jurisdiction provided for in Article III upon inferior courts of its cre-

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<sup>31</sup> Its functions were continued under the Defense Production Act of 1950, c. 932, § 408, 64 Stat. 798, 808, to determine the validity of price and wage stabilization orders issued under that Act. As of the latest bound volume of the Federal Reporter, 298 F. 2d xviii (1962), it is still in business clearing up its docket.

ation; until 1875 it conferred very little of it indeed. See pp. 21-22, *supra*. The Court of Customs and Patent Appeals therefore fits harmoniously into the federal judicial system authorized by Article III.

## VII.

Article III, § 2 provides in part:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . — to Controversies to which the United States shall be a Party . . . ."

The cases heard by the Court of Claims and the Court of Customs and Patent Appeals all arise under federal law, as we have seen; they are also cases in which the United States is a party. But in *Williams v. United States*, 289 U. S. 553, 572-578, far from making of that circumstance a further proof that the Court of Claims exercises the judicial power contemplated by Article III, this Court held that it did not because that article, so it was said, does not make justiciable controversies to which the United States is a party *defendant*.

The Court's opinion dwelt in part upon the omission of the word "all" before "Controversies" in the clause referred to. To derive controlling significance from this semantic circumstance seems hardly to be faithful to John Marshall's admonition that "it is *a constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407. But it would be needlessly literal to suppose that the Court rested its holding on this point. Rather it deemed controlling the rule, "well settled and understood" at the time of the Constitutional Convention, that "the sovereign power is immune from suit." 289 U. S., at 573.

Accordingly it becomes necessary to reconsider whether that principle has the effect claimed of rendering suits against the United States nonjusticiable in a court created under Article III.

At least one touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be maintained is of a sort "recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems." *United Steelworkers v. United States*, 361 U. S. 39, 44, 60 (FRANKFURTER, J., concurring). There can be little doubt that that test is met here. Suits against the English sovereign by petition of liberate, *monstrans de droit*, and other forms of action designed to gain redress against unlawful action of the Crown had been developed over several centuries and were well-established before the Revolution. See 9 Holdsworth, History of English Law, 7-45 (1926). Similar provisions for judicial remedies against themselves were made by the American States immediately after the Revolution. E. g., 9 Laws of Va. 536, 540 (1778) (Hening 1821); see *Higginbotham's Executrix v. Commonwealth*, 25 Gratt. 627, 637-638 (Va. 1875). This history was known by Congress when it established the Court of Claims, see Cong. Globe, 33d Cong., 2d Sess. 73 (1854) (remarks of Senator Pettit), and undoubtedly was familiar to the Framers of the Constitution, most of them lawyers.

Hamilton's views, quoted in the *Williams* case, 289 U. S., at 576, are not to the contrary. To be sure, Hamilton argued that "the contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will." The Federalist, No. 81 (Wright ed. 1961), at 511. But that is because there was no surrender of

sovereign immunity in the plan of the convention;<sup>32</sup> so that, for suits against the United States, it remained "inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*" *Ibid.* (emphasis in original). In this sense, and only in this sense, is Article III's extension of judicial competence over controversies to which the United States is a party ineffective to confer jurisdiction over suits to which it is a defendant. For "behind the words of the constitutional provisions are postulates which limit and control." *Monaco v. Mississippi*, 292 U. S. 313, 322. But once the consent is given, the postulate is satisfied, and there remains no barrier to justiciability. Cf. *Cohens v. Virginia*, 6 Wheat. 264, 383-385.

So the Court had given itself to understand before *Williams* was decided. In *United States v. Louisiana*, 123 U. S. 32, 35, it held maintainable under Article III a suit brought in the Court of Claims by a State against the United States with Congress' consent. And in *Minnesota v. Hitchcock*, 185 U. S. 373, 384, which reaffirmed that ruling, the Court said:

"This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant."

Further in the same opinion, 185 U. S., at 386, the Court significantly remarked:

"While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United

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<sup>32</sup> As there was, for example, in suits between States and by the United States against a State. *Rhode Island v. Massachusetts*, 12 Pet. 657, 720; *United States v. Texas*, 143 U. S. 621, 639-646.

States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition."

To deny that proposition now would be to call into question a large measure of the jurisdiction exercised by the United States District Courts. Under the Federal Tort Claims Act, § 410 (a), 60 Stat. 842, 843-844 (1946), as amended, 28 U. S. C. § 1346 (b), those courts have been empowered to determine the tort liability of the United States in suits brought by individual plaintiffs. In so doing, they exercise functions akin to those of the Court of Claims, as is evidenced by the statutory authorization of appeals to that court from their judgments, with the consent of the appellee. § 412 (a)(2), 60 Stat. 844-845 (1946), as amended, 28 U. S. C. § 1504.

In truth the District Courts have long been vested with substantial portions of the identical jurisdiction exercised by the Court of Claims. The Tucker Act, § 2, 24 Stat. 505 (1887), as amended, 28 U. S. C. § 1346 (a)(2), gives them concurrent jurisdiction over the suits it authorizes, when the amount in controversy is less than \$10,000. Under that Act a District Court sits "as a court of claims," *United States v. Sherwood*, 312 U. S. 584, 591, and affords the same rights and privileges to suitors against the United States. *Bates Manufacturing Co. v. United States*, 303 U. S. 567, 571. See generally Schwartz and Jacoby, *Government Litigation* (tentative ed. 1960), 109-111.

There have been and are further statutory indications that Congress regards the two courts interchangeably. In 1921, Mr. Justice Brandeis compiled a list of 17 statutes passed during World War I, permitting suit against the United States for the value of property seized for use in the war effort, and authorizing them to be instituted in either the Court of Claims or one of the District Courts.

*United States v. Pfitsch*, 256 U. S. 547, 553 n. 1. Today, 28 U. S. C. § 1500 gives litigants an election to sue the United States as principal in the Court of Claims or to pursue their claims against its agents in any other court, including the District Courts. See *National Cored Forgings Co. v. United States*, 132 Ct. Cls. 11, 132 F. Supp. 454. In addition, by the Act of September 13, 1960, §§ 1, 2 (a), 74 Stat. 912, Congress added §§ 1406 (c) and 1506 to Title 28 of the United States Code, providing for transfer between the Court of Claims and any District Court when a suit within one court's exclusive jurisdiction is brought mistakenly in another.

These evidences of congressional understanding that suits against the United States are justiciable in courts created under Article III may not be lightly disregarded. Nevertheless it is probably true that Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court. It remains to consider whether that circumstance suffices to render non-judicial the decision of claims against the United States in the Court of Claims.

*First.* Throughout its history the Court of Claims has frequently been given jurisdiction by special act to award recovery for breach of what would have been, on the part of an individual, at most a moral obligation. *E. g.*, 45 Stat. 602 (1928), as amended, 25 U. S. C. §§ 651-657; *Indians of California v. United States*, 98 Ct. Cls. 583, 599. Congress has waived the benefit of *res judicata*, *Cherokee Nation v. United States*, 270 U. S. 476, 486, and of defenses based on the passage of time, *United States v. Alcea Band of Tillamooks*, 329 U. S. 40, 45-46; *United States v. Central Eureka Mining Co.*, 357 U. S. 155.

In doing so, as this Court has uniformly held, Congress has enlisted the aid of judicial power whose exercise is amenable to appellate review here. *United States v.*

*Alcea Band of Tillamooks, supra*; see *Colgate v. United States*, 280 U. S. 43, 47-48. Indeed the Court has held that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted constitutional court. *United States v. Realty Co.*, 163 U. S. 427.

The issue was settled beyond peradventure in *Pope v. United States*, 323 U. S. 1. There the Court held that for Congress to direct the Court of Claims to entertain a claim theretofore barred for any legal reason from recovery—as, for instance, by the statute of limitations, or because the contract had been drafted to exclude such claims—was to invoke the use of judicial power, notwithstanding that the task might involve no more than computation of the sum due. Consent judgments, the Court recalled, are nonetheless judicial judgments. See 323 U. S., at 12, and cases cited. After this decision it cannot be doubted that when Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function.

*Second.* Congress has on occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this Court. *E. g., District of Columbia v. Eslin*, 183 U. S. 62. But that is not incompatible with the possession of Article III judicial power by the tribunal affected. Congress has consistently with that article withdrawn the jurisdiction of this Court to proceed with a case then *sub judice*, *Ex parte McCordle*, 7 Wall. 506; its power can be no less when dealing with an inferior federal court, *In re Hall*, 167 U. S. 38, 42. For as Hamilton assured those of his contemporaries who were concerned about the reach of power that might be vested in a federal judiciary, "it ought to be recollect that the

national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove [any] . . . inconveniences." *The Federalist*, No. 80 (Wright ed. 1961), at 505.

The authority is not, of course, unlimited. In 1870, Congress purported to withdraw jurisdiction from the Court of Claims and from this Court on appeal over cases seeking indemnification for property captured during the Civil War, so far as eligibility therefor might be predicated upon an amnesty awarded by the President, as both courts had previously held that it might. Despite *Ex parte McCordle, supra*, the Court refused to apply the statute to a case in which the claimant had already been adjudged entitled to recover by the Court of Claims, calling it an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case. *United States v. Klein*, 13 Wall. 128. Surely no such concern would have been manifested if it had not been thought that the Court of Claims was invested with judicial power.<sup>33</sup>

## VIII.

A more substantial question relating to the justiciability of money claims against the United States arises from the impotence of a court to enforce its judgments.

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<sup>33</sup> *Pocono Pines Assembly Hotels Co. v. United States*, 73 Ct. Cls. 447, leave to file petition for writ of mandamus or prohibition denied, 285 U. S. 526, in which the Congress "remanded" a final and unappealed decision against the United States to the Court of Claims for new findings, does not detract from the authority of *Klein*. Without examining anything else, it is enough to note that the considerations governing a grant or denial of a petition for mandamus are, like those controlling the issuance of a writ of certiorari, so discretionary with the Court as to deprive a denial of precedential effect on this score. Compare Sup. Ct. Rule 30, with Rule 19 (1), (2), and cf. *Brown v. Allen*, 344 U. S. 443, 488, 491-492 (opinion of FRANKFURTER, J.).

It was Chief Justice Taney's opinion, in *Gordon v. United States*, afterwards published at 117 U. S. 697, 702, that the dependence of the Court of Claims upon an appropriation by Congress to carry its awards into effect negatived the possession of judicial power:

"The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power."

But Taney's opinion was not the opinion of the Court. It was a memorandum of his views prepared before his death and circulated among, but not adopted by, his brethren. The opinion of the Court, correctly reported for the first time in *United States v. Jones*, 119 U. S. 477, 478, makes clear that its refusal to entertain the *Gordon* appeal rested solely on the revisory authority vested in the Secretary of the Treasury before the repeal of § 14. See also *United States v. Aire*, 6 Wall. 573, 576; *United States v. O'Grady*, 22 Wall. 641, 647; *Langford v. United States*, 101 U. S. 341, 344-345—in each of which the limitation of the *Gordon* decision to the difficulties caused by § 14 clearly appears.

Nevertheless the problem remains and should be considered. Its scope has, however, been reduced by the Act of July 27, 1956, § 1302, 70 Stat. 678, 694, 31 U. S. C. § 724a, a general appropriation act which eliminates the need for subsequent separate appropriations to pay judgments below \$100,000. A judgment creditor of this order simply files in the General Accounting Office a certificate of the judgment signed by the clerk and the chief judge of the Court of Claims, and is paid. 28 U. S. C. § 2517 (a). For judgments of this dimension, therefore, there need be no concern about the issuance of execution.

For claims in excess of \$100,000, 28 U. S. C. § 2518 directs the Secretary of the Treasury to certify them to Congress once review in this Court has been foregone or sought and found unavailing. This, then, is the domain

of our problem, for Art. I, § 9, cl. 7, vests exclusive responsibility for appropriations in Congress,<sup>34</sup> and the Court early held that no execution may issue directed to the Secretary of the Treasury until such an appropriation has been made. *Reeside v. Walker*, 11 How. 272, 291.

The problem was recognized in the Congress that created the Court of Claims, where it was pointed out that if ability to enforce judgments were made a criterion of judicial power, no tribunal created under Article III would be able to assume jurisdiction of money claims against the United States. Cong. Globe, 33d Cong., 2d Sess. 113 (1854) (remarks of Senator Stuart). The subsequent vesting of such jurisdiction in the District Courts, pp. 35-36, *supra*, of course bears witness that at least the Congress has not thought such a criterion imperative.

Ever since Congress first accorded finality to judgments of the Court of Claims, it has sought to avoid interfering with their collection. Section 7 of the Act of March 3, 1863, 12 Stat. 765, 766, provided for the payment of final judgments out of general appropriations. In 1877, Congress shifted for a time to appropriating lump sums for judgments certified to it by the Secretary of the Treasury, not in order to question the judgments but to avoid the possibility that a large judgment might exhaust the prior appropriation. Act of March 3, 1877, c. 105, 19 Stat. 344, 347; see 6 Cong. Rec. 585-588 (1877). A study concluded in 1933 found only 15 instances in 70 years when Congress had refused to pay a judgment. Note, 46 Harv. L. Rev. 677, 685-686 n. 63. This historical record, surely more favorable to prevailing parties than that obtaining in private litigation, may well make us doubt whether the capacity to enforce a judgment is always indispensable for the exercise of judicial power.

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<sup>34</sup> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."

The Court did not think so in *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 461-462, where the issue was the justiciability under Article III of a declaratory judgment action brought by the United States in the Court of Claims to determine its liability for payment of an award procured by the defendant from an international arbitral commission assertedly through fraud. See also *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 263. Nor has it thought so when faced with the exactly analogous problem presented by suits for money between States in the original jurisdiction. That jurisdiction has been upheld, for example, in *South Dakota v. North Carolina*, 192 U. S. 286, 318-321, notwithstanding the Court's recognition of judicial impotence to compel a levy of taxes or otherwise by process to enforce its award. See especially the opinions of Chief Justice Fuller and Chief Justice White at the beginning and inconclusive end of the extended litigation between Virginia and West Virginia, 206 U. S. 290, 319 (1907) and 246 U. S. 565 (1918), in which the Court asserted jurisdiction to award damages for breach of contract despite persistent and never-surmounted challenges to its power to enforce a decree.<sup>35</sup> If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States. We conclude that the presence of the United States as a party defendant to suits maintained in the Court of Claims and the Court of Customs and Patent Appeals does not debar those courts from exercising the judicial power provided for in Article III.

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<sup>35</sup> See also the intervening opinions and dispositions: 209 U. S. 514; 220 U. S. 1, 36; 222 U. S. 17, 19-20; 231 U. S. 89; 234 U. S. 117; 238 U. S. 202; 241 U. S. 531.

## IX.

All of the business that comes before the two courts is susceptible of disposition in a judicial manner. What remains to be determined is the extent to which it is in fact disposed of in that manner.

A preliminary consideration that need not detain us long is the absence of provision for jury trial of counter-claims by the Government in actions before the Court of Claims. Despite dictum to the contrary in *United States v. Sherwood*, 312 U. S. 584, 587, the legitimacy of that nonjury mode of trial does not depend upon the supposed "legislative" character of the court. It derives instead, as indeed was also noted in *Sherwood*, *ibid.*, from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not "suits at common law" within the meaning of the Seventh Amendment. *McElrath v. United States*, 102 U. S. 426, 439-440. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. Cf. *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211; see 74 Harv. L. Rev. 414, 415 (1960).<sup>36</sup>

The principal question raised by the parties under this head of the argument is whether the matters referred by Congress to the Court of Claims and the Court of Customs and Patent Appeals are submitted to them in a form consonant with the limitation of judicial power to "cases or

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<sup>36</sup> The provision in 28 U. S. C. § 2503 for Commissioners to take evidence and make preliminary rulings is conformable in all respects with the practice of masters in chancery. For the judicial quality of the proceedings, see the Revised Rules of the Court of Claims, effective December 2, 1957, 140 Ct. Cls. ii, 28 U. S. C. App., p. 5237, as amended, *id.* (Supp. III), p. 863.

controversies" imposed by Article III. We may consider first the bulk of jurisdiction exercised by the two courts, reserving for separate treatment in the next section of this opinion two areas which may reasonably be regarded as presenting special difficulty.

"Whether a proceeding which results in a grant is a judicial one," said Mr. Justice Brandeis for a unanimous Court, "does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. It may give to the individual the option of either an administrative or a legal remedy. Or it may provide only a legal remedy. [See pp. 19-22, *supra*]. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." *Tutun v. United States*, 270 U. S. 568, 576-577. (Citations omitted.)

It is unquestioned that the Tucker Act cases assigned to the Court of Claims, 28 U. S. C. § 1491, advance to judgment "according to the regular course of legal procedure." Under this grant of jurisdiction the court hears tax cases, cases calling into question the statutory authority for a regulation, controversies over the existence or extent of a contractual obligation, and the like. See generally Schwartz and Jacoby, *Government Litigation* (tentative ed. 1960), 131-223. Such cases, which account for as much as 95% of the court's work,<sup>37</sup> form the staple judi-

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<sup>37</sup> In 1950, Tucker Act cases constituted 2,350 of the 2,472 proceedings conducted by the court. Wilkinson, *The United States Court of Claims*, 36 A. B. A. J. 89, 159 (1950). The percentage may

cial fare of the regular federal courts. There can be no doubt that, to the "expert feel of lawyers," *United Steelworkers v. United States*, 361 U. S. 39, 44, 60 (FRANKFURTER, J., concurring), they constitute cases or controversies.

The balance of the court's jurisdiction to render final judgments may likewise be assimilated to the traditional business of courts generally. Thus the court has been empowered to render accountings,<sup>38</sup> to decide if debts<sup>39</sup> or penalties<sup>40</sup> are due the United States, and to determine the liability of the United States for patent or copyright infringement<sup>41</sup> and for other specially designated torts.<sup>42</sup> In addition, it has been given jurisdiction to review, on issues of law including the existence of substantial evidence, decisions of the Indian Claims Commission.<sup>43</sup> Each of these cases, like those under the Tucker Act, is contested, is concrete, and admits of a decree of a sufficiently conclusive character. See *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 240-241.

The same may undoubtedly be said of the customs jurisdiction vested in the Court of Customs and Patent Appeals by 28 U. S. C. § 1541.<sup>44</sup> Contests over classifi-

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well have been augmented since that time by the extension of Tucker Act jurisdiction to Indian claims accruing after August 13, 1946. 28 U. S. C. § 1505, added by 63 Stat. 102 (1949).

<sup>38</sup> 28 U. S. C. § 1494 (contractors or their sureties); 28 U. S. C. §§ 1496, 2512 (disbursing officers).

<sup>39</sup> R. S. § 5261 (1878), as amended, 45 U. S. C. § 87 (Government-aided railroads).

<sup>40</sup> 28 U. S. C. § 1499 (violations of the Eight-Hour Law, 37 Stat. 137 (1912), as amended, 40 U. S. C. § 324).

<sup>41</sup> 28 U. S. C. (Supp. III) § 1498.

<sup>42</sup> 28 U. S. C. §§ 1495, 2513 (wrongful imprisonment); 28 U. S. C. § 1497 (trespass to oyster beds).

<sup>43</sup> 60 Stat. 1049, 1054 (1946), 25 U. S. C. § 70s.

<sup>44</sup> 42 Stat. 15 (1921), as amended, 19 U. S. C. § 169, makes 28 U. S. C. § 1541 applicable as well to the antidumping statute. See also 46 Stat. 735 (1930), as amended, 19 U. S. C. § 1516 (b), (c),

cation and valuation of imported merchandise have long been maintainable in inferior federal courts. Under R. S. § 3011 (1878), suits after protest against the collector were authorized in the circuit courts. *E. g., Greeley's Administrator v. Burgess*, 18 How. 413; *Iasigi v. The Collector*, 1 Wall. 375. When the Customs Administrative Act of 1890 was passed, c. 407, 26 Stat. 131, repealing that section and creating a Board of General Appraisers to review determinations of the collector, a further right of review was provided in the Circuit Courts. See *DeLima v. Bidwell*, 182 U. S. 1, 175. This Court took unquestioned appellate jurisdiction from those courts on numerous occasions. *E. g., United States v. Ballin*, 144 U. S. 1; *Hoeninghaus v. United States*, 172 U. S. 622. It has continued to accept review by certiorari from the Court of Customs Appeals since the jurisdiction of the Circuit Courts was transferred to it in 1909. *E. g., Five Per Cent Discount Cases*, 243 U. S. 97; *Barr v. United States*, 324 U. S. 83. That the customs litigation authorized by § 1541 conforms to conventional notions of case or controversy seems no longer open to doubt.

Doubt has been expressed, however, about the jurisdiction conferred by 28 U. S. C. § 1542 and 60 Stat. 435 (1946), as amended, 15 U. S. C. § 1071, to review application and interference proceedings in the Patent Office relative to patents and trademarks. Parties to those proceedings are given an election to bring a civil action to contest the Patent Office decision in a District Court under 35 U. S. C. §§ 145, 146, or to seek review in the Court of Customs and Patent Appeals under 35 U. S. C. § 141. If the latter choice is made, the Court confines its review to the evidence adduced before the Patent

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permitting classification or valuation cases to be initiated by protest from a competing domestic manufacturer, after which the importer's consignee may be made a party to suit in the Customs Court, with appeal to the Court of Customs and Patent Appeals.

Office and to the questions of law preserved by the parties; its decision "shall be entered of record in the Patent Office and govern the further proceedings in the case." 35 U. S. C. § 144. The codification "omitted as superfluous" the last sentence in the existing statute: "But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question." Act of July 8, 1870, c. 230, § 50, 16 Stat. 198, 205; see Reviser's Note to 35 U. S. C. § 144.

The latter provision was evidently instrumental in prompting a decision of this Court, at a time when review of Patent Office determinations was vested in the Court of Appeals for the District of Columbia, that the ruling called for by the statute was not of a judicial character. *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 699. That is the most that the *Postum* holding can be taken to stand for, as *United States v. Duell*, 172 U. S. 576, 588-589, had upheld the judicial nature of the review in all other respects.<sup>45</sup> And the continuing vitality of the decision even to this extent has been seriously weakened if not extinguished by the subsequent holding in *Hoover Co. v. Coe*, 325 U. S. 79, 88, sustaining the justiciability of the alternative remedy by civil action even though the Court deemed "the effect of adjudication in equity the same as that of decision on appeal." See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals: Patent Office and Tariff Commission Cases, 18 G. W. L. Rev. 192, 194-198 (1950).

<sup>45</sup> Curiously, *Duell* was not cited in *Postum*, while the cases that were—*Frasch v. Moore*, 211 U. S. 1; *Atkins v. Moore*, 212 U. S. 285; *Baldwin Co. v. Howard Co.*, 256 U. S. 35—had, as the Court recognized, held only that the statutory scheme of review did not produce a "final judgment" as required by the statute then governing appeals to the Court.

At the time when *Postum* was decided, the proceeding in equity against the Patent Office was cumulative rather than alternative with the review by appeal, and it seems likely that it was this feature of the statute which caused the Court to characterize the judgment of the Court of Appeals as "a mere administrative decision." 272 U. S., at 698. Thereafter Congress made the remedies alternative, Act of March 2, 1927, c. 273, § 11, 44 Stat. 1335, 1336, and it was this amended jurisdiction that it later transferred to the Court of Customs and Patent Appeals, renaming the court in the process. Act of March 2, 1929, c. 488, 45 Stat. 1475.

It may still be true that Congress has given to the equity proceeding a greater preclusive effect than that accorded to decisions of the Court of Customs and Patent Appeals.<sup>46</sup> Even so, that circumstance alone is insufficient to make those decisions nonjudicial. *Tutun v. United States*, 270 U. S. 568, decided by the same Court as *Postum* and not there questioned, is controlling authority. For the Court there held that a naturalization proceeding in a Federal District Court was a "case" within the meaning of Article III, even though the Government was empowered by statute<sup>47</sup> to bring a later bill in equity for cancellation of the certificate.

Mr. Justice Brandeis, the author of the *Tutun* opinion, had also prepared the Court's opinion in *United States v. Ness*, 245 U. S. 319, which upheld the Government's right to seek denaturalization even upon grounds known to and

<sup>46</sup> See Stern and Gressman, *Supreme Court Practice* (1950), 44-46. But see *Hobart Mfg. Co. v. Landers, Frary & Clark*, 26 F. Supp. 198, 202, aff'd per curiam, 107 F. 2d 1016; *Battery Patents Corp. v. Chicago Cycle Supply Co.*, 111 F. 2d 861, 863; Reviser's Note, 35 U. S. C. § 144.

<sup>47</sup> Naturalization Act of June 29, 1906, c. 3592, § 15, 34 Stat. 596, 601.

asserted unsuccessfully by it in the naturalization court.<sup>48</sup> Proceedings in that court, the opinion explained, were relatively summary, with no right of appeal, whereas the denaturalization suit was plenary enough to permit full presentation of all objections and was accompanied with appeal as of right. 245 U. S., at 326. These differences made it reasonable for Congress to allow the Government another chance to contest the applicant's eligibility.

The decision in *Tutun*, coming after *Ness*, draws the patent and trademark jurisdiction now exercised by the Court of Customs and Patent Appeals fully within the category of cases or controversies. So much was recognized in *Tutun* itself, 270 U. S., at 578, where Mr. Justice Brandeis observed:

“If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit. ‘It is in this respect,’ as stated in *Johannesen v. United States*, 225 U. S. 227, 238, ‘closely analogous to a public grant of land (Rev. Stat., § 2289, etc.,) or of the exclusive right to make, use and vend a new and useful invention (Rev. Stat., § 4883, etc.).’” (Emphasis added.)

Like naturalization proceedings in a District Court, appeals from Patent Office decisions under 35 U. S. C. § 144 are relatively summary—since the record is limited to the evidence allowed by that office—and are not themselves subject to direct review by appeal as of right.<sup>49</sup> It

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<sup>48</sup> For later developments, see *Schneiderman v. United States*, 320 U. S. 118, 123–125; *Knauer v. United States*, 328 U. S. 654, 671–673; *Chaunt v. United States*, 364 U. S. 350.

<sup>49</sup> We intimate no opinion whether 28 U. S. C. § 1256 was intended by Congress to make patent and trademark cases reviewable by certiorari in this Court. See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals, 18 G. W. L. Rev. 192, 194–198 (1950).

was as reasonable for Congress, therefore, to bind only the Patent Office on appeals and to give private parties whether or not participants in such appeals a further opportunity to contest the matter on plenary records developed in litigation elsewhere. This practice but furnishes a further illustration of the specialized jurisdiction of the Court of Customs and Patent Appeals, akin to that of the Commerce Court, in passing upon the consistency with law of expert administrative judgments without undertaking to conclude private parties in nonadministrative litigation. We conclude that the *Postum* decision must be taken to be limited to the statutory scheme in existence before the transfer of patent and trademark litigation to that court.

## X.

We turn finally to the more difficult questions raised by the jurisdiction vested in the Court of Customs and Patent Appeals by 28 U. S. C. § 1543 to review Tariff Commission findings of unfair practices in import trade, and the congressional reference jurisdiction given the Court of Claims by 28 U. S. C. §§ 1492 and 1509. The judicial quality of the former was called into question though not resolved in *Ex parte Bakelite Corp.*, 279 U. S. 438, 460–461,<sup>50</sup> while that of the latter must be taken to have been adversely decided, so far as susceptibility to Supreme Court review is concerned, by *In re Sanborn*, 148 U. S. 222.<sup>51</sup>

<sup>50</sup> Section 316 (c) of the Tariff Act of 1922, c. 356, 42 Stat. 858, 943, involved in *Bakelite*, was reenacted in virtually identical terms by § 337 (c) of the Tariff Act of 1930, 46 Stat. 590, 703, as amended, 19 U. S. C. § 1337 (c).

<sup>51</sup> *Sanborn* involved the departmental reference jurisdiction of the Court of Claims, since repealed by 67 Stat. 226 (1953); but the functions performed by the court in that case were not in substance different from those it still performs on request by Congress.

At the outset we are met with a suggestion by the Solicitor General that even if the decisions called for by these heads of jurisdiction are nonjudicial, their compatibility with the status of an Article III court has been settled by *O'Donoghue v. United States*, 289 U. S. 516, 545-548. It is true that *O'Donoghue* upheld the authority of Congress to invest the federal courts for the District of Columbia with certain administrative responsibilities—such as that of revising the rates of public utilities<sup>52</sup>—but only such as were related to the government of the District. See *Pitts v. Peak*, 60 U. S. App. D. C. 195, 197, 50 F. 2d 485, 487, cited and relied upon in *O'Donoghue*, 289 U. S., at 547-548.<sup>53</sup> To extend that holding to the wholly nationwide jurisdiction of courts whose seat is in the District of Columbia would be to ignore the special importance attached in the *O'Donoghue* opinion to the need there for an independent national judiciary.

<sup>52</sup> See *Keller v. Potomac Electric Power Co.*, 261 U. S. 428.

<sup>53</sup> *Federal Radio Comm'n v. General Electric Co.*, 281 U. S. 464, which sustained the authority of the Court of Appeals for the District of Columbia to render an "administrative" decision respecting the issuance of a radio broadcasting license to a station in Schenectady, New York, was decided at a time when the courts of the District were regarded wholly as legislative courts. *Id.*, at 468.

It is significant that all of the jurisdiction at issue in the *Keller*, *Postum*, and *General Electric* cases has long since been transformed into judicial business. The change with respect to review of Patent Office decisions took place, as we have seen, p. 47, *supra*, before the transfer of that jurisdiction to the Court of Customs and Patent Appeals. Review of the Public Utilities Commission was restricted to questions of law upon the evidence before the Commission, in the Act of August 27, 1935, § 2, 49 Stat. 882, D. C. Code, 1961, § 43-705. See *Public Utilities Comm'n v. Pollak*, 343 U. S. 451, 458. And the Act of July 1, 1930, c. 788, 46 Stat. 844, likewise made review of the Radio Commission judicial, as was recognized in *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 274-278.

The restraints of federalism are, of course, removed from the powers exercisable by Congress within the District. For, as the Court early stated, in *Kendall v. United States*, 12 Pet. 524, 619:

"There is in this district, no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice."

Thus those limitations implicit in the rubric "case or controversy" that spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts, see Madison's Notes of the Debates, in II Farrand, Records of the Federal Convention (1911), 45-46, need have no application in the District. The national courts here may, consistently with those limitations, perform any of the local functions elsewhere performed by state courts.<sup>54</sup>

But those are not the only limitations embodied in Article III's restriction of judicial power to cases or con-

<sup>54</sup> The D. C. Code, 1961, Tit. 11, c. 5, establishes a special term of the United States District Court as a probate court, whereas the other Federal District Courts have been debarred from exercising such a jurisdiction as one traditionally within the domain of the States. *Byers v. McAuley*, 149 U. S. 608, 619. Similarly, the divorce proceedings maintainable under the general jurisdictional grant, D. C. Code, § 11-306; see *Bottomley v. Bottomley*, 104 U. S. App. D. C. 311, 262 F. 2d 23, are beyond the ken of the federal courts in the States. *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 383.

The appointing authority given judges of the District Court to select members of the Board of Education and of the Commission on Mental Health, D. C. Code, §§ 31-101, 21-308, is probably traceable to Art. II, § 2 of the Constitution. See note 10, *supra*; *Ex parte Siebold*, 100 U. S. 371, 397-398.

troveries. The restriction expresses as well the Framers' desire to safeguard the independence of the judicial from the other branches by confining its activities to "cases of a Judiciary nature," see II Farrand, *op cit., supra*, at 430, and in this respect it remains fully applicable at least to courts invested with jurisdiction solely over matters of national import. Our question is whether the independence of either the Court of Claims or the Court of Customs and Patent Appeals has been so compromised by its investiture with the particular heads of jurisdiction described above as to destroy its eligibility for recognition as an Article III court.

The jurisdictional statutes in issue, § 337 of the Tariff Act of 1930 and 28 U. S. C. §§ 1492, 2509, appear to subject the decisions called for from those courts to an extrajudicial revisory authority incompatible with the limitations upon judicial power this Court has drawn from Article III. See, *e. g.*, *Chicago & Southern Air Lines, Inc., v. Waterman S. S. Corp.*, 333 U. S. 103, 113-114; *Hayburn's Case*, 2 Dall. 409. Whether they actually do so is not, however, entirely free from difficulty, and cannot in our view appropriately be decided in a vacuum, apart from the setting of particular cases in which we may gauge the operation of the statutes. For disposition of the present cases, we think it is sufficient simply to note the doubt attending the validity of the jurisdiction, and to proceed on the assumption that it cannot be entertained by an Article III court.

It does not follow, however, from the invalidity, actual or potential, of these heads of jurisdiction, that either the Court of Claims or the Court of Customs and Patent Appeals must relinquish entitlement to recognition as an Article III court. They are not tribunals, as are for example the Interstate Commerce Commission or the Federal Trade Commission, a substantial and integral part of whose business is nonjudicial.

The overwhelming majority of the Court of Claims' business is composed of cases and controversies. See pp. 45-46, *supra*. In the past year, it heard only 10 reference cases, Annual Report of the Administrative Office of the United States Courts (1961), 318; and its recent annual average has not exceeded that figure, Pavenstedt, *The United States Court of Claims as a Forum for Tax Cases*, 15 Tax L. Rev. 1, 6 n. 23 (1959). The tariff jurisdiction of the Court of Customs and Patent Appeals is of even less significant dimensions. In the past fiscal year, that court disposed of 41 customs cases and 112 patent or trademark cases, but heard no appeals from the Tariff Commission. Annual Report of the Administrative Office of the United States Courts (1961), 318. Indeed we are advised that in all the years since 1922, when the predecessor to § 337 of the Tariff Act was first enacted, the Court of Customs and Patent Appeals has entertained only six such cases.<sup>55</sup> Certainly the status of a District Court or Court of Appeals would not be altered by a mere congressional attempt to invest it with such insignificant nonjudicial business; it would be equally perverse to make the status of these courts turn upon so minuscule a portion of their purported functions.

The Congress that enacted the assignment statute with its accompanying declarations was apprised of the possibility that a re-examination of the *Bakelite* and *Williams* decisions might lead to disallowance of some of these courts' jurisdiction. See 99 Cong. Rec. 8944 (1953) (remarks of Senator Gore); 104 Cong. Rec. 17549 (1958) (remarks of Senator Talmadge). Nevertheless it chose to pass the statute. We think with it that, if necessary, the particular offensive jurisdiction, and not the courts, would fall.

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<sup>55</sup> Brief on behalf of the chief judge and the associate judges of the United States Court of Customs and Patent Appeals as *amici curiae*, p. 10.

## CONCLUSIONS.

Since the Court of Claims and the Court of Customs and Patent Appeals are courts created under Article III, their judges—including retired judges, *Booth v. United States*, 291 U. S. 339, 350–351—are and have been constitutionally protected in tenure and compensation. Our conclusion, it should be noted, is not an *ex post facto* resurrection of a banished independence. The judges of these two courts have never accepted the dependent status thrust at them by the *Bakelite* and *Williams* decisions. See, *e. g.*, Judge Madden writing for the Court of Claims in *Pope v. United States*, 100 Ct. Cls. 375, 53 F. Supp. 570, rev'd, 323 U. S. 1. The factors set out at length in this opinion, which were not considered in the *Bakelite* and *Williams* opinions, make plain that the differing conclusion we now reach does no more than confer legal recognition upon an independence long exercised in fact.

That recognition suffices to dispose of the present cases. For it can hardly be contended that the specialized functions of these judges deprives them of capacity, as a matter of due process of law, to sit in judgment upon the staple business of the District Courts and Courts of Appeals. Whether they should be given such assignments may be and has been a proper subject for congressional debate, *e. g.*, 62 Cong. Rec. 190–191, 207–209 (1921), but once legislatively resolved it can scarcely rise to the dignity of a constitutional question. To be sure, a judge of specialized experience may at first need to devote extra time and energy to familiarize himself with criminal, labor relations, or other cases beyond his accustomed ken. But to elevate this temporary disadvantage into a constitutional disability would be tantamount to suggesting that the President may never appoint to the bench a lawyer whose life's practice may have been

devoted to patent, tax, antitrust, or any other specialized field of law in which many eminently well-qualified lawyers are wont to engage. The proposition will not, of course, survive its statement.

The judgments of the Courts of Appeals are

*Affirmed.*

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES

Nos. 242 AND 481.—OCTOBER TERM, 1961.

	The Glidden Company, etc., Petitioner, 242                          v. Olga Zdanok et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
481	Benny Lurk, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1962.]

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE joins, concurring in the result.

I cannot agree to the unnecessary overruling of *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929), and *Williams v. United States*, 289 U. S. 553 (1933). Both were unanimous opinions by most distinguished Courts,<sup>1</sup> headed in the *Bakelite* case by Chief Justice Taft and in *Williams* by Chief Justice Hughes.

Long before *Glidden v. Zdanok* was filed, the Congress had declared the Court of Claims “to be a court established under Article III of the Constitution of the United States.” Act of July 28, 1953, § 1, 67 Stat. 226. Not that this *ipse dixit* made the Court of Claims an Article III court, for it must be examined in light of the congressional power exercised and the jurisdiction enjoyed, together with the characteristics of its judges. But the 1953 Act

<sup>1</sup> *Bakelite*: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford and Stone; in *Williams*: Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts and Cardozo.

did definitely establish the intent of the Congress, which prior to that time was not clear in light of the *Williams* holding 20 years earlier that it was not an Article III court.

It is my belief that prior to 1953 the Court of Claims had all of the characteristics of an Article III court—jurisdiction over justiciable matters, issuance of final judgments, judges appointed by the President with consent of the Senate—save as to the congressional reference matters. It was the fact that a substantial portion of its jurisdiction consisted of congressional references that compelled the decision in *Williams* that it was not an Article III court and therefore the salaries of its judges could be reduced.<sup>2</sup> Since that time the Article III jurisdiction of the Court of Claims has been enlarged by including original jurisdiction under several Acts, e. g., suits against the United States for damages for unjust conviction, Act of May 24, 1938, §§ 1-4, 52 Stat. 438, 28 U. S. C. § 1495, and appellate jurisdiction over tort suits against the United States tried in the District Courts, Act of Aug. 2, 1946, § 412 (a)(2), 60 Stat. 844, 28 U. S. C. § 1504, and over suits before the Indian Claims Commission, Act of May 24, 1949, § 89 (a), 63 Stat. 102, 15 U. S. C. § 1505. In addition, the former jurisdiction over questions referred by the Executive branch was with-

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<sup>2</sup> "From the outset Congress has required it [the Court of Claims] to give merely advisory decisions on many matters. Under the act creating it all of its decisions were to be of that nature. Afterwards some were to have effect as binding judgments, but others were still to be merely advisory. This is true at the present time." *Williams v. United States, supra*, at 569 (quoting from *Ex parte Bakelite*).

"Further reflection tends only to confirm the views expressed in the *Bakelite* opinion . . . and we feel bound to reaffirm and apply these. And, giving these views due effect here, we see no escape from the conclusion that if the Court of Customs Appeals is a legislative court, so also is the Court of Claims." *Williams*, at 571. The *Bakelite* decision was posited squarely on the legislative reference function. See *Ex parte Bakelite, supra*, 454-458.

drawn in 1953. Act of July 28, 1953, § 8, 67 Stat. 226. The result is that practically all of the court's jurisdiction is now comprised of Article III cases. And I read the 1953 Act as unequivocally expressing Congress' intent that this court—the jurisdiction of which was then almost entirely over Article III cases—should be an Article III court, thereby irrevocably establishing life tenure and irreducible salaries for its judges.

It is true that Congress still makes legislative references to the court, averaging some 10 a year. The acceptance of jurisdiction of either executive or legislative references calling for advisory opinions has never been honored by Article III courts. Indeed, this Court since 1793 has consistently refused so to act. Correspondence of the Justices, 3 Johnston, Correspondence and Public Papers of John Jay (1891), 486–489. *Musk-rat v. United States*, 219 U. S. 346 (1911). I do not construe the legislative history of the 1953 Act to be so clear as to require the Court of Claims to carry on this function, which appears to be minuscule. On the contrary, the congressional mandate clearly and definitely declared the court "to be established under Article III." I would carry out that mandate. In my view the Court of Claims, if and when such a reference occurs, should with due deference advise the Congress, as this Court advised the President 169 years ago, that it could not render advisory opinions.

Likewise I find that the Court of Customs and Patent Appeals has been an Article III court since 1958. It was created by the Congress in 1909 to exercise exclusive appellate jurisdiction over customs cases. Payne-Aldrich Tariff Act of Aug. 5, 1909, 36 Stat. 11, 105–108. At that time these cases were reviewed by Circuit Courts of Appeals—clearly of Article III status—36 Stat. 106, and they have since been considered on certiorari by this Court

without suggestion that they were not "cases" in the Article III sense. *E. g., The Five Per Cent. Discount Cases*, 243 U. S. 47 (1917).<sup>3</sup> The Congress enlarged the jurisdiction of the Court of Customs and Patent Appeals in 1922 to include appeals on questions of law from Tariff Commission findings in proceedings relating to unfair practices in the import trade. Tariff Act of 1922, 42 Stat. 943, 944. In 1929 this Court in *Bakelite*, *supra*, which involved a tariff matter, found these references to be of an advisory nature and on this basis declared the Court of Customs and Patent Appeals to be a legislative rather than an Article III court. The *Bakelite* decision indicates that this Court was of the impression that the tariff jurisdiction of the Court of Customs and Patent Appeals would be significant. However, since that time that court has handled but four such references—and only one in the last 27 years. At about the same time that the *Bakelite* opinion came down, Congress transferred the appellate jurisdiction in patent and trademark cases from the Court of Appeals of the District of Columbia to the Court of Customs and Patent Appeals. Act of March 2, 1929, §§ 1, 2, 45 Stat. 1475. Thus contrary to the apparent assumption in *Bakelite*, the business of that court now consists exclusively of Article III cases—with tariff references practically nonexistent (one in the last 27 years). In view of this evolution of its jurisdiction, I believe the court became an Article III court upon the clear manifestation of congressional intent that it be such. Act of Aug. 25, 1958, § 1, 72 Stat. 848.

As I have indicated, *supra*, the handling of the tariff references—numbering only 6 in 40 years—is not an

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<sup>3</sup> That its original jurisdiction was in "cases" in the Article III § 2 sense cannot be questioned. See *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 198 (1928); *Osborn v. Bank of U. S.*, 9 Wheat. 738, 819 (1824); *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 487 (1894); *Tatum v. United States*, 270 U. S. 568, 576-577 (1926).

Article III court function. The Congress has declared the Court of Customs and Patent Appeals to be an Article III court. It should, therefore, if and when such a case arose, with due deference refuse to exercise such jurisdiction.<sup>4</sup>

I see nothing in the argument that the 1953 and 1958 Acts so changed the character of these courts as to require new presidential appointments. Congress was merely renouncing its power to terminate the functions or reduce the tenure or salary of the judges of the courts. Much more drastic changes have been made without reappointment.<sup>5</sup> And there is no significance to the fact that Judge Jackson, who presided over the Lurk trial, was not in active status in 1958 when Congress declared his court to be an Article III court. He remained in office as a judge of that court even though retired, cf. *Booth v. United States*, 291 U. S. 339 (1934), and his judgeship was controlled by any act concerning the jurisdiction of that court or the status of its judges.

I would affirm.

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<sup>4</sup> The validity of Judge Jackson's participation, as the government points out, might be also sustained under the Act of September 14, 1922, c. 306, § 35, 42 Stat. 837, 839, which provided for the assignment of judges of the Court of Custom Appeals to the courts of the District of Columbia. This Act was on the books when Judge Jackson took his seat on the Court of Customs and Patent Appeals as well as when the *Lurk* case was tried.

<sup>5</sup> Nor does my holding carry any implication that judgments entered prior to the date of these Acts in which judges of these courts participated might be collaterally attacked. *Ex parte Ward*, 173 U. S. 452 (1899).

# SUPREME COURT OF THE UNITED STATES

Nos. 242 AND 481.—OCTOBER TERM, 1961.

The Glidden Company, etc., Petitioner,	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
242                  v. Olga Zdanok et al.	
Benny Lurk, Petitioner, 481                  v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1962.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The decision in these cases has nothing to do with the character, ability, or qualification of the individuals who sat on assignment on the Court of Appeals in No. 242 and on the District Court <sup>1</sup> in No. 481. The problem is an

<sup>1</sup> The District Court of the District of Columbia, like the "inferior courts" established by Congress under Art. III, § 1, of the Constitution, is an Article III court (*O'Donoghue v. United States*, 289 U. S. 516), even though it possesses powers that Article III courts could not perform. Congress, acting under its plenary power granted by Art. I, § 8, to legislate for the District of Columbia, has from time to time vested in the courts of the District administrative and even legislative powers. See, e. g., *Keller v. Potomac Electric Co.*, 261 U. S. 428, 440-443 (review of rate making); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 698-701 (patent and trademark appeals); *Federal Radio Comm'n v. General Electric Co.*, 281 U. S. 464, 467-468 (review of radio station licensing; cf. *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 274-278). Congress has also authorized District Court judges to appoint members of the Board of Education. D. C. Code § 31-101.

In *O'Donoghue v. United States*, *supra*, at 545, the Court said:

"The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over non-federal causes

impersonal one, concerning the differences between an Article I court and an Article III court. My Brother HARLAN calls it a problem of a "highly theoretical nature." Far from being "theoretical" it is intensely practical, for it deals with powers of judges over the life and liberty of defendants in criminal cases and over vast property interests in complicated trials customarily involving the right to trial by jury.

Prior to today's decision the distinction between the two courts had been clear and unmistakable. By Art. I, § 8, Congress is given a wide range of powers, including the power "to pay the Debts" of the United States and the power to "lay and collect Taxes, Duties, Imports and Excises." By Art. I, § 8, Congress is also given the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Pursuant to the latter—the Necessary and Proper Clause—the Court of Claims was created "to pay the Debts";<sup>2</sup> and

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of action, or over quasi-judicial or administrative matters, does not affect the question. In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state."

The eighteenth-century courts in this country performed many administrative functions. See Pound, Organization of Courts (1940), pp. 88-89. The propriety of the union of legislative and judicial powers in a *state* court was assumed in *Prentis v. Atlantic Coast Line*, 211 U. S. 210.

<sup>2</sup> "Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

"Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress

the Court of Customs and Patent Appeals was created in furtherance of the collection of duties. My Brother HARLAN shows that the Court of Customs Appeals traces back to the Payne-Aldrich Tariff Act of August 5, 1909, which should be proof enough that it is an administrative court, performing essentially an executive task.<sup>3</sup>

In *Williams v. United States*, 289 U. S. 553, the Court in a unanimous decision written by Mr. Justice Suther-

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makes specific provision therefore. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

"The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies." *Ex parte Bakelite Corp.*, 279 U. S. 438, 451-452.

<sup>3</sup> "The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rules of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings." *Ex parte Bakelite Corp.*, *supra*, note 2, at 458.

land held that the Court of Claims, though exercising judicial power, was an Article I court. And in *Ex parte Bakelite Corp.*, 279 U. S. 438, the Court in a unanimous opinion written by Mr. Justice Van Devanter held the Court of Customs Appeals to be an Article I court. Taft was Chief Justice when *Ex parte Bakelite* was decided. Hughes was Chief Justice when *Williams v. United States* was decided. I mention the two regimes that filed the unanimous opinions in those cases to indicate the vintage of the authority which decided them. Their decisions, of course, do not bind us, for they dealt with matters of constitutional interpretation which are always open. Yet no new history has been unearthed to show that the Taft and the Hughes Courts were wrong on the technical, but vitally important, question now presented.

Mr. Justice Van Devanter in *Ex parte Bakelite* marked the line between the Court of Claims and the Court of Customs and Patent Appeals on the one hand and the District Courts and Courts of Appeals on the other:

“Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.” *Id.*, at 449.

My Brother HARLAN emphasizes that both Judge Madden of the Court of Claims and Judge Jackson of the Court of Customs and Patent Appeals "enjoy statutory assurance of tenure and compensation"; and so they do. But that statement reveals one basic difference between an Article III judge and an Article I judge. The latter's tenure is *statutory* and *statutory only*; Article I contains no guarantee that the judges of Article I courts have life appointments. Nor does it provide that their salaries may not be reduced during their term of office. On the other hand, the tenure of an Article III judge is for "good behaviour"; moreover, Article III provides that its judges shall have a compensation that "shall not be diminished during their Continuance in Office." See *O'Malley v. Woodrough*, 307 U. S. 277. To repeat, there is not a word in Article I giving its courts such protection in tenure or in salary. A constitutional amendment would be necessary to supply Article I judges with the guarantees of tenure and salary that Article III gives its judges. The majority attempt to evade this problem by looking to so-called "Congressional intent" to find the creation of an Article III court. Congress, however, has always understood that it was only establishing Article I courts when it created the Court of Claims and the Court of Customs and Patent Appeals. The tenure it affixed to the judges of those tribunals was of necessity statutory only, as no mandate or requirement of Article I was involved.

The importance of these provisions to the independence of the judiciary needs no argument. Hamilton stated the entire case in the Federalist No. 79 (Lodge ed. 1879), p. 491:

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made

in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent salaries* should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided that the judges of the United States 'shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.'

"This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less

eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. . . .

"This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.

"The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges."

We should say here what was said in *Toth v. Quarles*, 350 U. S. 11, 17:

". . . the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals."

Tenure that is guaranteed by the Constitution is a badge of a judge of an Article III court. The argument that mere *statutory* tenure is sufficient for judges of Article III courts was authoritatively answered in *Ex parte Bakelite Corp., supra*, at 459-460:

“. . . the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred. Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. *The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges and declared that they should hold their offices during good behavior; and yet the status of the judges was the same as it would have been had that declaration been omitted.* In creating courts for some of the Territories Congress failed to include a provision fixing the tenure of the judges; but the courts became legislative courts just as if such a provision had been included.” (Italics added.)

Congress could make members of the Interstate Commerce Commission lifetime appointees. Yet I suppose no one would go so far as to say that a member of the Interstate Commerce Commission could be assigned to sit on the District Court or on the Court of Appeals. But if any agency member is disqualified, why is a member of another Article I tribunal, *viz.*, the Court of Claims or the Court of Customs and Patent Appeals, qualified? No distinction can be drawn based on the functions performed by the Interstate Commerce Commission and those performed by the other two legislative tribunals. In each case

some adjudicatory functions are performed.<sup>4</sup> Though the judicial functions of the Interstate Commerce Commission are as distinct as those of the Court of Claims, they nevertheless derive from Article I; and they are functions that Congress can exercise directly or delegate to an agency. *Williams v. United States, supra*, pp. 567-571. To make the present decision turn on whether the Court of Claims and the Court of Customs and Patent Appeals perform "judicial" functions is to adopt a false standard. The manner in which the majority reasons exposes the fallacy.

The majority says that once the United States consents to be sued all problems of "justiciability" are satisfied; and that Congress has broad powers to convert "moral" obligations into "legal" ones enforceable by "constitutional" courts. The truth is, I think, that the dimensions of Article III can be altered only by the amending process, not by legislation. Congress can create as respects certain claims a limited "justiciability." But if "justiciability" in the "constitutional" sense is involved, then there must be trial by jury assuming, as my Brother HARLAN does, that the claim is for recovery for torts or some other compensable injury. To repeat, it does not advance analysis by calling the function a "judicial" one (see *Pope v. United States*, 323 U. S. 1, 12), for both Article I courts and Article III courts perform functions of that character. The crucial question on this phase of the problems is the manner in which that judicial power is to be exercised.

As Mr. Justice Brandeis made clear in *Tutun v. United States*, 270 U. S. 568, 576-577, an administrative remedy

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<sup>4</sup> The Interstate Commerce Commission has long entered reparation orders directing carriers to pay shippers specified sums of money plus interest for excessive and unreasonable rates. See *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 434; II Sharfman, *The Interstate Commerce Commission* (1937), pp. 387-388.

may be "judicial." The question here is different; it is whether the procedures utilized by the tribunal must comport to that set forth in the Bill of Rights and in the body of the Constitution. Yet who would maintain that in an administrative action for damages a jury trial was necessary?

Judges of the Article III courts work by standards and procedures which are either specified in the Bill of Rights or supplied by well-known historic precedents. Article III courts are *law courts*, *equity courts*, and *admiralty courts*<sup>5</sup>—all specifically named in Article III. They sit to determine "cases" or "controversies." But Article I courts have no such restrictions. They need not be confined to "cases" or "controversies" but can dispense legislative largesse. See *United States v. Tillamooks*, 329 U. S. 40; 341 U. S. 48. Their decisions may affect vital interests; yet like legislative bodies, zoning commissions, and other administrative bodies they need not observe the same standards of due process required in trials of Article III "cases" or "controversies." See *Bi-Metallic Co. v. Colorado*, 239 U. S. 411. That is what Chief Justice Marshall meant when he said in *American Ins. Co. v. Canter*, 1 Pet. 511, 545–546, that an Article I court (in

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<sup>5</sup> As respects admiralty, Chief Justice Marshall said in *American Ins. Co. v. Canter*, 1 Pet. 511, 545:

"If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.'

"The Constitution certainly contemplates these as three distinct classes of cases . . . ."

that case a territorial court) could make its adjudications without regard to the limitations of Article III. On the other hand, as the Court in *O'Donoghue v. United States*, *supra*, at 546, observed, Article III courts could not be endowed with the administrative and legislative powers (or with the power to render advisory opinions) which Article I tribunals or agencies exercise.

In other words, the question, apart from the constitutional guarantee of tenure and the provision against diminution of salary, concerns the functions of the particular tribunal. Article III courts have prescribed for them constitutional standards some of which are in the Bill of Rights, while some (as for example those concerning bills of attainder and *ex post facto* laws) are in the body of the Constitution itself. Article I courts, on the other hand, are agencies of the legislative or executive branch. Thus while Article III courts of law must sit with a jury in suits where the value in controversy exceeds \$20, the Court of Claims—an Article I court—is not so confined by the Seventh Amendment. The claims which it hears are claims with respect to which the government has agreed to be sued. As the Court said in *McElrath v. United States*, 102 U. S. 426, 440, since the jurisdiction of the Court of Claims is permissive only, Congress can prescribe the rules and the procedures to be followed in pursuing claims against the Government. Likewise, the Court of Customs Appeals hears appeals that "include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers." *Ex parte Bakelite Corp., supra*, at 458.

The judicial functions exercised by Article III courts cannot be performed by Congress nor delegated to

agencies under its supervision and control.<sup>6</sup> The bill of attainder is banned by Art. I, § 9. If there is to be punishment, courts (in the constitutional sense) must admin-

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<sup>6</sup> The limitations on Article III courts that distinguish them from Article I courts were stated by Chief Justice Vinson in *National Insurance Co. v. Tidewater Co.*, 337 U. S. 582, 629-630, in words that have, I think, general acceptance, though on the precise issue he wrote in dissent:

"In *Keller v. Potomac Electric Co.*, 261 U. S. 428 (1923), where this Court had before it an Act under which the courts of the District of Columbia were given revisory power over rates set by the Public Utilities Commission of the District, the appellee sought to sustain the appellate jurisdiction given this Court by the Act on the basis that 'Although Art. III of the Constitution limits the jurisdiction of the federal courts, this limitation is subject to the power of Congress to enlarge the jurisdiction, where such enlargement may reasonably be required to enable Congress to exercise the express powers conferred upon it by the Constitution.' 261 U. S., at 435. There, as here, the power relied upon was that given Congress to exercise exclusive jurisdiction over the District of Columbia, and to make all laws necessary and proper to carry such powers into effect. But this Court clearly and unequivocally rejected the contention that Congress could thus extend the jurisdiction of constitutional courts, citing the note to *Hayburn's Case*, 2 Dall. 409, 410 (1792); *United States v. Ferreira*, 13 How. 40, note, p. 52 (1851), and *Gordon v. United States*, 117 U. S. 697 (1864). These and other decisions of this Court clearly condition the power of a constitutional court to take cognizance of any cause upon the existence of a suit instituted according to the regular course of judicial procedure, *Marbury v. Madison*, 1 Cranch 137 (1803), the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decisions, *Muskrat v. United States*, 219 U. S. 346 (1911); *Gordon v. United States*, *supra*, the absence of revisory or appellate power in any other branch of Government, *Hayburn's Case*, *supra*; *United States v. Ferreira*, *supra*, and the absence of administrative or legislative issues or controversies, *Keller v. Potomac Electric Co.*, *supra*; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693 (1927)."

ister it. As we stated in *United States v. Lovett*, 328 U. S. 303, 317:

"Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts."

Moreover, when an Article III court of law acts, there is a precise procedure that must be followed:

"An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him." *Id.*, 317-318.

On the civil side there is not only the right to trial by jury in suits at common law where the value in controversy exceeds \$20 but there is also the mandate of the Seventh Amendment directing that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Neither of these limitations is germane to litigation in the Court of Claims or in the Court of Customs and Patent Appeals. Those courts, moreover, exercise no criminal jurisdiction, no admiralty jurisdiction, no equity jurisdiction.

As noted, the advisory opinion is beyond the capacity of Article III courts to render. *Muskrat v. United States*, 219 U. S. 346. Yet it is part and parcel of the function of legislative tribunals.<sup>7</sup>

Thus I cannot say, as some do, that the distinction between the two kinds of courts is a "matter of language."<sup>8</sup> The majority over and again emphasizes the declaration by Congress that each of the courts in question is an Article III court. It seems that the majority tries to gain momentum for its decision from those congressional declarations. This Court, however, is the expositor of the meaning of the Constitution, as *Marbury v. Madison*, 1 Cranch 137, held; and a congressional enactment in the field of Article III is entitled to no greater weight than in other areas. The declarations by Congress that these legislative tribunals are Article III courts<sup>9</sup> would be determinative only if Congress had the power to modify or alter the concepts that radiate throughout Article III and throughout those provisions of the Bill of Rights that specify how the judicial power granted by Article III shall be exercised.

An appointment is made by the President and confirmed by the Senate in light of the duties of the particular office. Men eminently qualified to sit on Article I tribunals or agencies are not picked or confirmed in light of their qualifications to preside at jury trials or to

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<sup>7</sup> See 28 U. S. C. § 1492, giving the Court of Claims power "to report to either House of Congress on any bill referred to the court by such House." And see 28 U. S. C. §§ 2509, 2510. 28 U. S. C. § 1542 gave the Court of Customs and Patent Appeals a kind of administrative review over certain decisions of the patent office. And see note 2, *supra*.

<sup>8</sup> See H. R. Rep. No. 2348, 84th Cong., 2d Sess., p. 3.

<sup>9</sup> See Act of July 28, 1953, 67 Stat. 226 (Court of Claims); Act of July 14, 1956, 70 Stat. 532 (Customs Court); Act of August 25, 1958, 72 Stat. 848 (Court of Customs and Patent Appeals).

process on appeal the myriad of constitutional and procedural problems involved in Article III "cases" or controversies." A President who sent a name to the Senate for the Interstate Commerce Commission or Federal Trade Commission might never dream of entrusting him with the powers of an Article III judge. The tasks are so different, the responsibilities and the qualifications so diverse that it is difficult for one who knows the federal system to see how in the world of practical affairs these offices are interchangeable.

In the Senate debate on the Court of Customs Appeals, Senator Cummins stated that the judges who were to man it were to become tariff "experts" whose judicial business would be "confined to the matter of the duties on imports." 44 Cong. Rec. 4185. Senator McCumber, who spoke for the Committee, emphasized the technical nature of the work of those judges and the unique specialization of their work.

"The law governing the development of the human intellect is such that constant study of a particular question necessarily broadens and expands and intensifies and deepens the mind on that particular subject. Any man who has gone over even the cotton schedule will understand how delicate questions will arise; how complex those questions must necessarily be, and how necessary it will be to have judges who will possess technical knowledge upon that subject; and a technical knowledge can only be obtained by a constant daily study of those questions. For that second reason it was thought best to have a court whose whole attention, whose whole life work, should be given to that particular subject." *Id.*, at 4199.

Could there be any doubt that the late John J. Parker, rejected by the Senate for this Court, would have been confirmed for one of these Article I courts?

It is said that Congress could separate law and equity and create federal judges who, though Article III judges, sit entirely on the equity side. If Congress can do that, it is said that Congress can divide up all judicial power as it chooses and by making tenure permanent allow judges to be assigned from an Article I to an Article III court. The fact that Article III judicial power may be so divided as to produce judges with no experience in the trial of jury cases or in the review of them on appeal is no excuse for allowing legislative judges to be imported into the important fields that Article III preserves and that are partly safeguarded by the Bill of Rights and partly represented by ancient admiralty practice<sup>10</sup> and equity procedures. Federal judges named to Article III courts are picked in light of the functions entrusted to them. No one knows whether a President would have appointed to an Article III court a man he named to an Article I court.

My view is that we subtly undermine the constitutional system when we treat federal judges as fungible. If members of the Court of Claims and of the Court of Customs and Patent Appeals can sit on life-and-death cases in Article III courts, so can a member of any administrative agency who has a *statutory* tenure that future judges sitting on this Court by some mysterious manner may change to constitutional tenure. With all deference, this seems to me to be a light-hearted treatment of Article III functions.<sup>11</sup> Men of highest quality chosen as Article I judges might never pass muster for Article III

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<sup>10</sup> See *The Lottawanna*, 21 Wall. 558, 575; *The Osceola*, 189 U. S. 158.

<sup>11</sup> The Court does great mischief in today's opinions. The opinion of my Brother HARLAN stirs a host of problems that need not be opened. What is done will, I fear, plague us for years.

First, that opinion cites with approval *Ex parte McCordle*, 7 Wall. 506, in which Congress withdrew jurisdiction of this Court to review a *habeas corpus* case that was *sub judice* and then apparently draws

courts when tested by their record of tolerance for minorities and for their respect of the Bill of Rights—neither of which is as crucial to the performance of the duties of those who sit in Article I courts as it is to the duties of Article III judges.

In sum, judges who do not perform Article III functions do not enjoy *constitutional* tenure nor are their salaries *constitutionally* protected against diminution during their term of office cannot be Article III judges.

Judges who perform "judicial" functions on Article I courts do not adjudicate "cases" or "controversies" in the sense of Article III. They are not bound by the requirements of the Seventh Amendment concerning trial by jury.

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a distinction between that case and *United States v. Klein*, 13 Wall. 128, where such withdrawal was not permitted in a property claim. There is a serious question whether the *McCardle* case could command a majority view today. Certainly the distinction between liberty and property (which emanates from this portion of my Brother HARLAN's opinion) has no vitality even in terms of the Due Process Clause.

Second, *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, is apparently overruled. Why this is done is not apparent. That case ruled on the question whether a ruling on a Patent Office determination was "judicial." Whether it was or not is immaterial because, as already noted, Article I courts, like Article III courts, exercise "judicial" power. The only relevant question here is whether a court that need not follow Article III procedures is nonetheless an Article III court.

Third, it is implied that Congress could vest the lower federal courts with the power to render advisory opinions. The character of the District Court in the District of Columbia has been differentiated from the other District Courts by *O'Donoghue v. United States*, *supra*, in that the former is, in part, an agency of Congress to perform Article I powers. How Congress could transform regular Article III courts into Article I courts is a mystery. Certainly we should not decide such an important issue so casually and so unnecessarily.

Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights as well as the other guarantees in the main body of the Constitution, including the ban on bills of attainder and *ex post facto* laws, were designed. Judges who might be confirmed for an Article I court, might never pass muster for the onerous and life-or-death duties of Article III judges.

For these reasons I would reverse the judgments below.

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**Supreme Court of the United States**

**OCTOBER TERM, 1961**

**No. 481**

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**BENNY LURK, PETITIONER**

*vs.*

**UNITED STATES**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**PETITION FOR CERTIORARI FILED JULY 21, 1961  
CERTIORARI GRANTED OCTOBER 9, 1961**

# Supreme Court of the United States

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[fol. A]

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Criminal Action No. 180-60

**UNITED STATES OF AMERICA**

v.

**BENNY LURK, DEFENDANT**

**Washington, D. C.  
Tuesday, March 22, 1960.**

**TRANSCRIPT OF PROCEEDINGS**

The above-entitled matter came on for trial at 11:15 a. m. before the HONORABLE JOSEPH R. JACKSON, Judge, and a jury.

**APPEARANCES:**

On behalf of the Government:

**JOHN W. WARNER, JR.  
Ass't United States Attorney.**

On behalf of the defendant:

**RALPH C. COLE, ESQ.  
1735 - 14th St. N.W.  
Wash. 9, D. C.**

\* \* \* \*

[fols. 3-8] \* \* \* \*

\* \* \* \*

[fol. 9] **CHARLES C. EDGEWORTH**

was called as a witness by and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

[fol. 10] BY MR. WARNER:

\* \* \* \*

[fol. 11] A. I paid the girl for my 2 meals and bottle of beer and the other girl was getting them ready and I was sitting there drinking the beer and a boy walked in with him.

Q. When you say him, who do you mean?

A. With Benny. The other fellow was in front of Benny.

Q. When you say Benny, do you mean one Benny Lurk?

A. That is right.

Q. The defendant in this case?

A. That is right.

Q. Where is he in the courtroom today?

A. Sitting right here.

Q. How is he dressed?

A. He was dressed—

Q. How is he dressed today?

THE COURT: How is he dressed now?

THE WITNESS: He has got on a brown jacket.

BY MR. WARNER:

Q. With or without necktie?

A. No necktie.

MR. WARNER: May the record show this witness has identified the defendant, Your Honor?

THE COURT: The record may so show.

BY MR. WARNER:

[fol. 12] Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquan.

MR. WARNER: I think we should strike that answer, Your Honor, I didn't realize that was the case.

THE COURT: It may be stricken.

BY MR. WARNER:

Q. So you had seen him before this date, is that correct?  
A. That is right.

[fols. 13-14] \* \* \* \*

\* \* \* \*

[fol. 15] CROSS EXAMINATION

BY MR. COLE:

[fols. 16-26] \* \* \* \*

\* \* \* \*

[fol. 27] Q. And what did you do at headquarters?

A. I described the men to them and told them what happened.

Q. And you told them that you knew this man; is that correct?

A. I told them I knew his face but didn't know his name.

Q. I believe you mentioned that you knew this man at Occoquan; is that right?

MR. WARNER: I think that answer has been stricken from the record, Your Honor.

THE COURT: The question may be stricken.

MR. COLE: Your Honor, I believe I have a right to ask where he knew this man.

THE COURT: If this man has a record all right. Why do you mention Occoquan?

MR. COLE: Of course, we are not introducing his record at this time, but I think—

THE COURT: Why don't you ask him where he saw him first?

BY MR. COLE:

Q. Where did you first see this man, Mr. Lurk?

A. 7th and T.

Q. When was this?

[fol. 28] A. Over 4 or 5 years ago, maybe longer.

Q. Did you know him at that time?

A. No, I never knew him. I just knew his face when I would see him.

Q. You saw this man for the first time in your life at 7th and T Streets, Northwest; is that correct?

A. That is right.

Q. What happened that impressed his identity upon you?

A. The man was sitting in the next booth to me drinking beer.

Q. 7th and T about 4 or 5 years ago?

A. Yes, it may be longer than that.

Q. Did you have any conversation with him at that time?

A. No.

Q. Well, what happened that his identification was impressed upon you at that particular time?

A. His identification wasn't impressed upon me.

Q. How can you so clearly remember that you saw Benny Lurk 5 years ago at 7th and T Streets, Northwest?

A. Any time I see a person's face one time I never forget it.

Q. I see. Now, where was the next time you saw Benny Lurk?

A. 7th and T.

[fol. 29] Q. 7th and P, as in Paul?

A. 7th and P Streets, Northwest.

Q. Is that P as in Paul?

A. Yes, P as in Paul.

Q. When was that occasion?

A. Oh, that wasn't very long after I seen him at 7th and T.

Q. At the same bar room?

A. No, it wasn't.

Q. Standing on the street?

A. Standing outside on the sidewalk. He was with some more people talking.

Q. And you talked with him?

A. No, I didn't talk with him. I was talking to another fellow named March.

Q. When was the next time that you saw him after that particular instance?

A. From time to time I have seen Benny for the last 5 or 6 years, from time to time, but not knowing his name.

Q. Would you call him a friend of yours?

A. I don't.

Q. An acquaintance?

A. No.

Q. Did you ever talk to Benny?

[fol. 30] A. Once.

Q. Where was that?

A. 7th and P.

Q. Do you recall what the conversation was?

A. He wanted to get a drink, me and him and March.

Q. Did you want a drink too?

A. No.

Q. How long ago was that?

A. That was long in April or May.

Q. Now, you described each and every time that you have ever seen Benny Lurk?

A. Yes.

Q. Other than these times at 7th and P Streets, you have never seen Benny Lurk, is that right?

A. Yes.

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through—

THE COURT: He told you yes, he saw him. Now pursue your question.

THE WITNESS: Me and Benny done a year in Occoquan, that is why I knew him.

Q. What were you charged with?

A. Assault.

[fol. 31] Q. You did a year in Occoquan?

A. That is right.

Q. You saw Benny there, you say?

A. Yes, I used to be the food adviser.

\* \* \* \*

[fols. 32-52] \* \* \* \*

\* \* \* \*

[fol. 53] THE COURT: Closing argument for the defendant.

MR. COLE: May it please the Court, may it please you ladies and gentlemen of the jury:

[fol. 54] • • • •

[fol. 55] These are things that you have to decide. These [fol. 56] are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years. And then we have this situation, over 6 weeks passes by and then suddenly one day Mr. Edgeworth, the complaining witness, sees Benny Lurk, the face that he never forgets, and he calls the police and they come. And they take Benny Lurk to headquarters.

[fol. 57-59] • • • •

[fol. 60]

JUDGE'S CHARGE

[fols. 62-65] • • • •

[fol. 66] The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquan.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

The law does not compel any defendant to take the [fol. 67] witness stand and testify, therefore, no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of the defendant to testify. The defendant is under no obligation to testify when he is being tried.

[fols. 68-70] • • • • •

[fol. 71] AT THE BENCH

THE COURT: Are you satisfied with the instructions?

MR. WARNER: The Government is satisfied.

MR. COLE: Satisfied, Your Honor.

[fols. 72-74] • • • • •  
• • • • •

[fol. 75] Reporter's Certificate to foregoing transcript  
omitted in printing

[fol. 76] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1481

BENNY LURK, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR LEAVE TO PROSECUTE APPEAL WITHOUT  
PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT  
THEREOF—Filed May 16, 1960

The petitioner, Benny Lurk being first duly sworn, on oath deposes and says that he desires to appeal from the order (or judgment) entered in the District Court on April 29, 1960 in Crim. No. 180-60, Benny Lurk v. United States of America, and is unable to pay the costs of the appeal, or to give security therefor; and that he believes that he is entitled to redress.

Your petitioner further states that subsequent to the entry of the order (or judgment) an application to prosecute an appeal from the order (or judgment) without prepayment of costs, accompanied by an affidavit in conformity with Section 1915 of Title 28, U. S. Code, was on April 28, 1960, made to the trial court, thereby enabling the trial judge to certify whether or not the appeal was taken in good faith, and that the trial court on May 4, 1960, denied petitioner's application.

The nature of the appeal is as follows:

To appeal from the conviction and judgment rendered by United States District Court for the District of Columbia on the 29th day of April 1960, Honorable Judge Jackson presiding, and list as the reasons for his appeal the following:

- 1.—Denied due process of law by having incompetent counsel appointed by the court who failed to summons witnesses who were vital to petitioner's defense.

- 2.—No probable cause for arrest.
- 3.—No positive identification made at any time.
- 4.—Denied a fair and impartial trial.
- 5.—Arrest was made on mere suspicion. (See *Poldo v. United States*, 55 F 2d 866, 869.) As follows: "Mere suspicion is not enough, there must be circumstances represented to the arresting officers through testimony of their senses sufficient to justify them in a good faith belief that the defendant had violated the law . . ."

[fol. 77] WHEREFORE, petitioner requests that he be allowed to appeal from the order (or judgment) without being required to prepay fees or costs, or to give security therefor.

/s/ Benny Lurk  
Petitioner.

*Duly sworn to by Benny Lurk. Jurat omitted in printing*

[fol. 78] IN UNITED STATES COURT OF  
APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Prettyman, Chief Judge, in Chambers.

ORDER APPOINTING COUNSEL—May 18, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis, it is

ORDERED that Eugene Gressman, Esquire, a member of the bar of this court, is appointed to represent petitioner and allowed until June 18, 1960, to file a memorandum in support of the petition.

[fol. 79] IN THE UNITED STATES  
COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

MOTION FOR PRODUCTION OF TRANSCRIPT—  
Filed June 15, 1960

Petitioner, through his Court-appointed counsel, hereby moves the Court for an order directing that a transcript of the trial proceedings in the District Court, held on March 22, 1960, be prepared at the expense of the United States and that petitioner's counsel be given at least 30 days following the receipt of such transcript to prepare and file a memorandum in support of the petition for leave to prosecute an appeal *in forma pauperis*. As grounds for this motion, petitioner's counsel states:

1. Following his appointment by this Court as counsel for petitioner, counsel examined the available court files, interviewed the petitioner and conferred with Mr. Ralph C. Cole, the attorney appointed to represent petitioner at the trial in the District Court. These measures were taken in order to determine as accurately as possible whether there exists any non-frivolous grounds of appeal, and, more particularly, whether there is any basis for asserting, as petitioner has done *pro se*, that (1) he was represented at the trial by incompetent court-appointed counsel who failed to summon vital witnesses, (2) that there was no probable cause for arrest, (3) there was [fol. 80] a denial of a fair and impartial trial and (4) there was no positive identification made of the petitioner at any time.

2. The absence of a transcript, however, has made it impossible for counsel to evaluate and present the merits of this appeal in such a manner as to do full justice to petitioner and to fulfill his duties to this Court. Particularly after conferring with court-appointed trial counsel, this counsel is not convinced that the trial was conducted

free of all reversible errors or that there was a complete absence of plain errors going to the justness and fairness of the proceeding.

3. Thus in a case of this nature, the merits or frivolousness of the appeal cannot be tested or determined by any means other than an examination of the trial record. The available sources of information outside the record—the formal files and the memory of certain individuals—are too incomplete and uncertain to constitute a substitute for the transcript. And if counsel is to be enabled to give full effect to the direction of the Supreme Court in *Ellis v. United States*, 356 U.S. 674, that "representation in the role of an advocate is required," the transcript must be made available. See *Griffin v. Illinois*, 351 U.S. 12.

Wherefore, it is submitted that the transcript should be prepared at the expense of the United States.

Respectfully submitted,

/s/ Eugene Gressman  
1701 K Street, N.W.  
Washington 6, D. C.  
Counsel for Petitioner  
appointed by this Court

[fol. 81]

CERTIFICATE OF SERVICE  
(omitted in printing)

[fol. 82] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Edgerton and Bazelon, Circuit Judges,  
in Chambers.

ORDER DIRECTING THAT STENOGRAPHIC TRANSCRIPT BE  
FURNISHED—July 8, 1960

On consideration of petitioner's motion to have stenographic transcript prepared at the expense of the United States, respondent's opposition, and petitioner's reply, it is

ORDERED by the court that petitioner be allowed to prosecute an appeal without prepayment of costs to the extent of having the transcript of the proceedings in the District Court prepared without costs, and it is

FURTHER ORDERED by the court that the stenographic transcript of proceedings in this case in the District Court be furnished to petitioner at the expense of the United States.

Per Curiam.

Dated: July 8, 1960

[fol. 83] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO  
PROSECUTE AN APPEAL IN FORMA PAUPERIS—  
Filed August 31, 1960

This memorandum is filed pursuant to this Court's order dated May 18, 1960, appointing the undersigned counsel to represent the petitioner. On July 8, 1960, in response to a motion made on behalf of the petitioner, the Court ordered that petitioner be allowed to prosecute the appeal without prepayment of costs to the extent of having the transcript of the trial proceedings in the District Court prepared without costs and furnished to petitioner at the expense of the United States. Counsel has accordingly had the benefit of such transcript in the preparation of this memorandum.

STATEMENT OF THE CASE

On January 27, 1960, a report was filed in the District Court concerning a proceeding had the previous day before United States Commissioner James F. Splain. That report recited that the petitioner had been arrested for an alleged violation of the robbery statute, 22 D.C. Code 2901, that he had been brought before the Commissioner and informed of his right to retain counsel, and that petitioner had requested an immediate hearing. The report then summarized the testimony of the witness for the United States, Charles C. Edgeworth, as follows:

[fol. 84] ". . . on Dec. 14, 1959 while in Miss Jones' restaurant between 10 and 10:30 P.M., waiting for a carry out food order, the def. and another man came into the place; *that he knows the Def. because he*

*served a year in Jail with the Def.; that the other man stuck a knife into him and said don't move; that while he was being held at knife point, the Def. went into his pockets and removed his money and also took his eyeglasses; that he was cut in the hand by the knife and the Def. and the other man ran out; that he went home and called the police." (Emphasis added).*

The report concluded by stating that probable cause had been shown. Bail was fixed at \$5000 and petitioner, who had not testified, was committed to jail.

On February 23, 1960, a one-count indictment was filed in the District Court charging that petitioner "stole and took from the person and from the immediate actual possession of Charles C. Edgeworth property of Charles C. Edgeworth of the value of about \$58.31 consisting of the following: one billfold of the value of \$2.00, \$46.31 in money and one pair of eyeglasses of the value of \$10.00."

The following day, February 24, Ralph E. Becker was appointed to represent the petitioner, but on February 26, Ralph C. Cole was appointed in his stead. Petitioner was arraigned on February 26 without counsel present; he entered a plea of not guilty and was remanded to the District jail. On March 4, with counsel Cole present, petitioner was arraigned again and again pleaded not guilty.

Trial was had before the jury on March 22, 1960, Judge Joseph R. Jackson presiding. At the trial, four witnesses testified for the United States and none for the defense. The testimony of the prosecution witnesses may be summarized as follows:

*Charles C. Edgeworth*, the complaining witness, testified that on the evening of December 14, 1959, he had gone to Miss Jones' Restaurant at 9th and O Streets, N.W., in [fol. 85] Washington, D.C., to order some food to take out. While waiting for the food to be prepared he ordered and drank a bottle of beer. Tr. 11. The petitioner and a companion walked into the restaurant at that point. The companion put a knife to Edgeworth's stomach while petitioner rifled his pockets and snatched money from his hands. Tr. 13. Edgeworth was cut on the hand by the

knife. Tr. 13. Petitioner and his companion (who was never identified) then ran out of the restaurant. Tr. 13. Edgeworth told a waitress that he had been robbed of his money. Tr. 14. He then got a cab, went home and called the police. Tr. 14. Some time later he observed petitioner near a street corner, called the robbery squad, and pointed petitioner out to the policemen who arrived in answer to the call. Tr. 14. Petitioner was thereupon arrested. Edgeworth also testified as to the amount of money and the value of the other items taken from him. Tr. 15.

Edgeworth was cross-examined thoroughly by petitioner's appointed counsel. Tr. 15-35. On cross-examination, Edgeworth recounted more details as to the incidents in the restaurant, including certain remarks made by petitioner and his companion in the course of the robbery. Tr. 18-19. He stated that there were about 15 to 20 people in the restaurant at the time. Tr. 23. He further stated that about 10 minutes elapsed between the robbery and the moment when the food he had ordered was ready. Tr. 25. He told one of the waitresses that he had been robbed, and she told him not to follow the men. Tr. 21. Finally, when his food was ready, Edgeworth departed in a cab, went home and called the police. Tr. 24. There was a phone booth in the restaurant but he did not use it. Tr. 25. The police, in response to his call from home, told Edgeworth to come to headquarters the following [fol. 86] morning, Tr. 26, at which time he told what happened and described the men, Tr. 27. He stated to the police that he knew petitioner's face but not his name. Tr. 27. Edgeworth recounted that he had seen petitioner on various occasions in the past. Tr. 27-30.

Edgeworth was also cross-examined as to the events on January 26, 1960, when petitioner was arrested. Tr. 32-35. He happened to see petitioner in front of a beer garden at the corner of 7th and P Streets, N.W. Tr. 33. Edgeworth immediately went inside a drug store and called the police, who sent a squad car. Tr. 33. Edgeworth got into the squad car and pointed out petitioner to the officers, petitioner having moved in the meantime to a parking lot on 8th Street. Tr. 34.

*Annie Alston*, the second prosecution witness, was a waitress at the restaurant. She recalled that Edgeworth had been in the restaurant on the night in question and that she had observed money being snatched from Edgeworth's hands. Tr. 37. She also had seen the cut on Edgeworth's hand but did not see the men who took the money. Tr. 37. On cross-examination, she testified that four men had come into the restaurant and had sat down at a table. Tr. 41. They left right after the robbery but she did not know who they were. Tr. 42. She did not see any of them rifle Edgeworth's pockets but did see one of them snatch money from Edgeworth's hand. Tr. 42. Edgeworth started to follow them out but then returned. Tr. 43. She heard him tell another waitress that he had been robbed. Tr. 43.

The other waitress referred to by Annie Alston was not produced as a witness, the Assistant United States Attorney stating that efforts to locate her had proved futile. Tr. 45.

The other two witnesses for the prosecution were *Detective George R. Wilson* and *Private David B. McQueen*. The first officer testified that Edgeworth had told him of the robbery on the morning of December 15 and had de [fol. 87] scribed petitioner to him, though not by name. Tr. 46-47. Private McQueen testified that he had placed petitioner under arrest on January 25, after being called by Edgeworth to the vicinity of 7th and P Streets, N. W. Tr. 49-50.

Following the presentation of this testimony the United States rested its case and the defense waived "its right to place the defendant on the stand." Tr. 48. In addition to the foregoing summary of testimony, the following colloquies are to be noted:

*(Direct examination of Edgeworth  
by Assistant United States Attorney, Tr. 12.)*

Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquan.

MR. WARNER: I think we should strike that answer, Your Honor, I didn't realize that was the case.

THE COURT: It may be stricken.

\* \* \* \* \*

*(Cross-examination of Edgeworth by  
petitioner's appointed counsel, Tr. 27.)*

Q. And what did you do at headquarters?

A. I described the men to them and told them what happened.

Q. And you told them that you knew this man; is that correct?

A. I told them I knew his face but didn't know his name.

Q. I believe you mentioned that you knew this man at Occoquan; is that right?

MR. WARNER: I think that answer has been stricken from the record, Your Honor.

[fol. 88] THE COURT: The question may be stricken.

MR. COLE: Your Honor, I believe I have a right to ask where he knew this man.

THE COURT: If this man has a record all right. Why do you mention Occoquan?

MR. COLE: Of course, we are not introducing his record at this time, but I think—

THE COURT: Why don't you ask him where he saw him first?

\* \* \* \* \*

*(Cross-examination of Edgeworth  
by petitioner's appointed counsel. Tr. 30-31)*

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through—

THE COURT: He told you yes, he saw him. Now pursue your question.

THE WITNESS: Me and Benny done a year in Occoquan, that is why I knew him.

- Q. What were you charged with?  
A. Assault.  
Q. You did a year at Occoquan?  
A. That is right.  
Q. You saw Benny there, you say?  
A. Yes, I used to be the food adviser.

\* \* \* \* \*

*(Closing argument by petitioner's  
appointed counsel. Tr. 56.)*

These are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years.

\* \* \* \* \*

[fol. 89] *(Judge's charge to jury, Tr. 66.)*

The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquan.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

\* \* \* \* \*

At the conclusion of the trial, the jury found petitioner guilty as charged. A motion for a new trial was denied on March 29, 1960. Petitioner was then duly sentenced to a prison term of not less than 4 years and 9 months and of not more than 14 years and 3 months.

On April 29, 1960, the District Court granted the petition of Ralph C. Cole to be relieved of his assignment to defend petitioner. Petitioner then filed *pro se* a motion for leave to appeal *in forma pauperis*, which motion the District Court denied on May 4, 1960, "as plainly frivolous and not made in good faith."

Petitioner's *pro se* petition for leave to appeal *in forma pauperis* was filed in this Court on May 16, 1960.

SUBSTANTIAL QUESTIONS PRESENTED  
BY THE RECORD

On behalf of the petitioner, it is submitted that there are at least two questions posed by the record that are non-frivolous and, indeed, substantial in nature so as to warrant the grant of permission to proceed *in forma pauperis*. Certain other questions raised by the petitioner *pro se* are, in the opinion of undersigned counsel, either [fol. 90] without merit or are subsumed under the first question presented herewith.<sup>1</sup>

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<sup>1</sup> Petitioner *pro se* has made the following points:

1. He was denied due process by having incompetent counsel appointed by the District Court who failed to summon witnesses vital to the defense of petitioner. But the undersigned counsel suggests that the said appointed counsel, insofar as the formal record is concerned, conducted a vigorous defense on behalf of petitioner. Inquiry of said appointed counsel has revealed that he did not call other witnesses since he did not feel that they could contribute any testimony helpful to the defense. If there is to be any criticism of that counsel, it is in terms of his failure to raise specific objections to the questions, answers and jury charge in connection with the first substantial question presented in this memorandum.

2. There was no probable cause for arrest. But the complaint of the complaining witness and his description and pointing out of the petitioner would seem to provide sufficient cause.

3. No positive identification at any time. But the complaining witness did identify petitioner at the time of his arrest. The complete reliance on the complaining witness for identification purposes, however, is implicitly involved and is of some importance in the first substantial question discussed in this memorandum.

4. Petitioner was denied a fair and impartial trial. It is not clear to what this allegation refers. But see the first point discussed in this memorandum.

5. Petitioner's arrest was made on mere suspicion. But see point 2 above.

I. *Do the references at the trial to petitioner's past criminal record constitute plain reversible error?*

Axiomatic, of course, is the proposition that where a criminal defendant does not take the stand evidence as to his unsavory character or past criminal record is inadmissible. This is so, not because of its irrelevance, but because of a dominant policy which recognizes that what tends to show a likelihood that the accused has flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial on the instant charge. *Michelson v. United States*, 335 U.S. 469, 475; *Boyd v. United States*, 142 U.S. 450.

In this case, the record contains repeated references to the fact that petitioner had previously been in prison [fol. 91] at Occoquan Workhouse, a well-known jail for District of Columbia prisoners. Since petitioner did not take the stand in self-defense, a serious and substantial question is thereby raised in terms of the above-stated policy. Full review and consideration of this case is necessary in order to determine if petitioner has been accorded a full measure of his constitutional right to a fair trial. Several facets to this problem are presented by the record:

A. *The prosecution was responsible for the first reference to petitioner's past criminal record.* As previously indicated herein (pp. 1-2, *supra*), about two months before the trial, the U.S. Commissioner filed a report which summarized the evidence of the complaining witness. That report indicated that the witness testified that he had identified the petitioner "because he served a year in Jail with the Def". And that report was presumably in the hands of the Assistant United States Attorney, or at least available to him, when he examined the complaining witness on the stand at the trial.

Thus when the Assistant United States Attorney asked the complaining witness where he had seen the petitioner before, he must have known or should have known that the witness would answer to the effect that he had seen petitioner in jail. Tr. 12. The prosecutor cannot be heard to say, as he did, that "I didn't realize that was the case." Tr. 12.

But even if it be considered that the answer was unexpected, and inadvertent from the Government's point of view, the fact remains that the answer was elicited by Government counsel and not by the defense. Cf. *United States v. Tramaglino*, 197 F. 2d 928, 932 (C.A. 2). Error was committed by the reference to petitioner's prior presence at Occoquan, a reference made in the presence of the jury.

[fol. 92] The availability of the earlier report of the U. S. Commissioner, however, makes pertinent the language and holding of the court in *United States v. Tomaiolo*, 249 F. 2d 683, 695-696 (C.A. 2):

"And it is fairly apparent that the prosecutor knew that the answers to his questions would reveal Soviero's criminal past. Certainly the special agents of the FBI had already advised him, out of court, of the reason why Soviero refused to sign the statement.

"Nor may Tomaiolo's testimony be classed as purely voluntary. Even if he did not have actual knowledge of the times during which Louis Soviero was in prison, the prosecutor had the means of gaining such information. Yet he pressed the reluctant Tomaiolo to answer. . . ."

B. *The reference to petitioner's criminal record was not an isolated one but was reiterated on several occasions.* Had there been but the one instance of mentioning petitioner's former incarceration, an argument could be made that it was sufficiently isolated and immediately stricken so as to be inconsequential. See *United States v. Stromberg*, 268 F. 2d 256, 269 (C.A. 2). But such is not this case. Petitioner's court-appointed counsel brought out the matter again in a question<sup>2</sup> which was stricken before an answer could be given. Tr. 27. But almost immediately the trial judge himself mentioned Occoquan, asking coun-

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<sup>2</sup> The attorney apparently asked the question to bring out the fact that the witness rather than the petitioner had a criminal record. Tr. 27. See his closing argument. Tr. 56. But the question was artlessly phrased and served to emphasize petitioner's record.

sel "why do you mention Occoquan?" Tr. 27. The damage was further compounded a short while later when the complaining witness, immediately after a direction by the judge to pursue the preceding question, volunteered the information again that petitioner had "done a year at [fol. 93] Occoquan." Tr. 30. This time no objection was made and the answer remained unstricken.

Finally, the Court itself, in its charge to the jury, reiterated the fact that petitioner and the complaining witness had "met at Occoquan," Tr. 66, and that this fact should be considered only in connection with the credibility of the complaining witness.

Here, then, was an accumulation of the original remark, which had been induced by the prosecution. A serious question is thus raised as to whether the mere striking of the original answer of the defense counsel's subsequent question was enough to cure the error, repeated as it was on at least four occasions. Cf. *United States v. Giallo*, 206 F. 2d 207, 209-210 (C.A. 2), affirmed, 346 U.S. 929.

To the extent that petitioner's trial counsel contributed to the error, it must be remembered that he was appointed by the court below and was not of petitioner's own choosing. In that setting, it may be unfair to saddle petitioner with the consequences of such an error by appointed counsel. But more importantly, the whole chain of references originated in the original question by the prosecution and was repeated by the court itself and by the complaining witness without accompanying disavowals to the jury. Tr. 30, 66. Such a chain of events, all emphasizing petitioner's prior record, could only serve to prejudice the jury and deprive petitioner of a fair trial. *United States v. Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2).

C. *The error was not cured by adequate instructions to the jury or other action of the trial judge.* When the complaining witness first mentioned the petitioner's prior incarceration, the trial judge did no more than strike the answer on the prosecutor's request. Tr. 12. The judge [fol. 94] also did no more than strike defense counsel's question referring to that previous answer, again on the prosecutor's suggestion. Tr. 27. But when the witness subsequently volunteered the fact that "Me and Benny

done a year at Occoquan," Tr. 30, the prosecutor, the defense counsel and the Court remained silent. And, to cap matters, the judge himself repeated the reference to Occoquan in the presence of the jury both during the trial, Tr. 27, and in his instructions to the jury, Tr. 66. On neither of those occasions did the judge take adequate precautions as to the possible prejudicial effect on the jury.

Simply striking the one answer and the one question was not enough. It has been held that merely telling the jury, at the suggestion of the prosecutor, to "disregard the last statement" is inadequate in the absence of a sufficient instruction. *United States v. Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2). By the same token, the judicial statement here that the answer or the question "may be stricken," Tr. 12, 27, is inadequate in the absence of sufficient instructions. But not even that inadequate protection was afforded as to the witness' later reiteration of the prejudicial fact. Tr. 30.

The instruction to the jury on this matter was totally inadequate. Tr. 66. The judge merely told the jury that the fact that the petitioner and the witness had met at Occoquan did not permit an inference of guilt of the petitioner, that it was to be "considered only in as far as it affects his (the complaining witness') credibility as a witness." Tr. 66. Nowhere was there any command to the jury, or even a suggestion, to disregard the Occoquan references completely. There was nothing like the judicial direction in *United States v. Curzio*, 179 F. 2d 380, 381 (C.A. 3), "to brush it from your minds, because it has nothing to do with this case," a direction there repeated [fol. 95] in the instructions that "there is no evidence in this case that Mr. Curzio has a police record or that he has ever been convicted of any crime before, so wipe that out of your minds completely."

Nor did the judge here do what the trial judge did in *United States v. Stromberg*, 268 F. 2d 256, 269 (C.A. 2), and direct the jury "to pay no attention to that remark in any way . . . to disregard it completely." See also *Marsh v. United States*, 82 F. 2d 703, 704 (C.A. 3). In *United States v. Apuzzo*, 245 F. 2d 416, 420, note 4 (C.A. 2), over a strong dissent, the trial judge who himself

had induced the improper testimony was held to have overcome the error only by promptly telling the jury that the prejudicial facts "ought not to have been brought out . . . you are to disregard anything you heard . . . blame me for anything that occurred in that respect" and by later instructing the jury that "any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant."

Here there was nothing but an unexplained striking of some of the prejudicial remarks, a striking that was devoid of any simultaneous warning to the jury to disregard the remarks. And some of the remarks were not stricken. By the end of the trial, before the instructions, the jury had firmly implanted in its mind that the petitioner had a prior criminal record. Nothing the court had done served to dismiss that fact from the jury's mind. In these circumstances, a short statement of two sentences in the instructions to disregard the prejudicial fact in determining guilt but to consider that fact in assessing the credibility of the complaining witness falls abysmally short of the judicial action essential to preserve the fairness of the trial.

[fol. 96] D. *This error was plain, substantial and reversible, even in the absence of objection by petitioner's counsel.* The references to petitioner's past criminal record were so flagrant and so prejudicial as to call for correction by this Court and a reversal of the conviction pursuant to Rule 52(a) of the Federal Rules of Criminal Procedure. As in *United States v. Modern Reed & Rattan Co.*, 159 F. 2d 656, 658 (C.A. 2), this Court should not "fail to notice a plain error so far reaching because no objection was taken." And compare *Surratt v. United States*, 269 F. 2d 240, 241 (App. D.C.). The ruling in *United States v. James*, 208 F. 2d 124, 125 (C.A. 2), is particularly pertinent in this connection:

"The effect of the introduction of this testimony was too clearly to show a proclivity to commit crime and thus blacken, to his prejudice, the character of the appellant, who did not by testifying make that an

issue, to permit his erroneous admission of it to pass as harmless error."

Moreover, the only witness to identify petitioner as a participant in the crime was the complaining witness. Since it was made plain that this witness also had a criminal record, his testimony may have been substantially discredited in the eyes of the jury. And conviction of petitioner conceivably could have rested in large part upon the impression of petitioner gained by the jury during the trial as to his past criminal proclivities. By the time the instructions were given, that prejudicial factor may have become so dominant that far more than the off-hand direction to disregard the criminal record in assessing guilt may have been necessary. The inadmissible testimony may thus have been not only prejudicial but pivotal in a close case such as this. See *United States v. Tramaglino*, 197 F. 2d 928, 932 (C.A. 2).

It is submitted, therefore, that a substantial question [fol. 97] warranting full review is inescapably presented by the record in this case.

## II. *Was the trial judge properly assigned to conduct the trial in this case?*

A second substantial question presented by this record grows out of the fact that the presiding judge, Judge Joseph R. Jackson, was a retired member of the Court of Customs and Patent Appeals acting on assignment for the year 1960 to the United States District Court for the District of Columbia. Serious constitutional questions as to the validity of that assignment and as to the power of Judge Jackson to preside at this trial are thereby raised. More particularly, the following considerations are involved:

A. *The legislative nature of the Court of Customs and Patent Appeals.* Judge Jackson retired from the Court of Customs and Patent Appeals as of April 1, 1952. See 193 F. 2d XV. As of that time there can be no question but that the said court was very plainly "a legislative and not a constitutional court." *Ex parte Bakelite Corp.*, 279 U.S. 438, 459. It was a court created solely to determine

"matters arising between the government and others in the executive administration and application of the customs laws," and its functions included "nothing which inherently or necessarily requires judicial determination." *Ibid.*, 458. See *Katz*, Federal Legislative Courts, 43 Harv. L. Rev. 894.<sup>3</sup>

True, Congress in 1958 sought to declare that court as one "established under Article III of the Constitution of the United States." 72 Stat. 848, 28 U.S.C.A. 211. What the effect is of such a declaration need not here be explored. The important fact, and one only emphasized by the 1958 amendment, is that as of 1952 and earlier, [fol. 98] the Court of Customs and Patent Appeals was plainly a legislative and not a constitutional court. The 1958 amendment can neither add to nor detract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later.

The conclusion seems to follow that Judge Jackson was never nominated or confirmed for any position other than that of a judge on a legislative court.

B. *The constitutional nature of the United States District Court for the District of Columbia.* On the other hand, the District Court below is very plainly one of the "constitutional courts of the United States, ordained and established under Art. 3 of the Constitution; that the judges of these courts hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office." *O'Donoghue v. United States*, 289 U.S. 516, 551. In addition, certain administrative or non-judicial functions may constitutionally be given the court below, making it something of a hybrid court from the constitutional viewpoint. Such non-judicial functions grow out of the power of Congress to legislate for the District of Columbia. See 1 Moore, *Federal Practice*, Sec. 0.4(4), page 72 (2d ed.). But the basic fact remains that it is essentially and primarily a constitutional court, the judges of whom are nominated, confirmed and vested with authority for

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<sup>3</sup> See discussion of this matter by this Court in *Eastern States Petroleum Corp. v. Rogers*, No. 15109, decided May 12, 1960.

purposes of exercising the judicial power of the United States under Article III of the Constitution.

C. *The statutory basis of Judge Jackson's assignment.* There can be no doubt, moreover, as to the purported *statutory* authority for the assignment of a retired member of the Court of Customs and Patent Appeals to the District Court below. Under 72 Stat. 849, 28 U.S.C.A. 294, as amended in 1958, and even before, a retired judge [fol. 99] of the former court can be designated and assigned to the court below. For purposes of that statute, a retired judge of the Court of Customs and Patent Appeals is a "retired judge of the United States."

D. *The constitutional question as to the validity of the assignment.* The ultimate question thus is whether a designation and assignment to the court below of a judge who retired in 1952 from the Court of Customs and Patent Appeals can *constitutionally* be made so as to authorize such a judge to exercise the judicial powers of the court below. Or, can 72 Stat. 849, 28 U.S.C.A. 294, constitutionally be utilized to effect such an assignment?

The answer to that question is both unclear and significant in terms of petitioner's right to be tried by a tribunal properly constituted. See *United States v. American-Foreign SS. Corp.*, 363 U.S. 685, as to the standing of a litigant to raise such an issue. It is a right which is truly significant and essential to the preservation of basic procedural guarantees. As the Supreme Court emphasized in *Toth v. Quarles*, 350 U.S. 11, 15-16, Article III courts are established "to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases. These courts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."

In other words, can Congress authorize the trial of an individual accused of crime—whether that crime be outlawed by the District Code or the United States Code—by

[fol. 100] a court consisting of any judge other than one who originally was vested with authority to sit on an Article III court? Could Congress, for example, authorize a retired Tax Court judge to be assigned to the court below?

The Supreme Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 460, implied that there may be "constitutional obstacles to assigning judges of constitutional courts to legislative courts." Equally true, and perhaps more so, there may be constitutional objections to assigning a retired legislative court judge to a constitutional court, particularly in order to exercise a judicial function. Such a retired judge may not have the constitutional status and freedom which only an Article III court judge can have.

Precisely those doubts have been adverted to in 1 Moore, Federal Practice, Sec. 0.4(1), page 60, note 34 (2d ed.), where it is noted that "Doubt as to the constitutionality of assigning judges from constitutional to legislative courts and vice versa was a reason Congress assigned for classifying the Court of Claims and Customs Court as constitutional courts." And see Note, 69 Harv. L. Rev. 760, casting doubt on the propriety of the assignment of a territorial court judge from Hawaii to the Court of Appeals for the Ninth Circuit in *Irish v. United States*, 225 F. 2d 3.

This problem, as indicated, is not easy of solution. See the diversity of opinion as to a related matter in *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582. But enough has been indicated to show that the problem is an important one inescapably presented by this case. It deserves full review and consideration by this Court, after the parties have had opportunity to explore and brief the manifold facets.

[fol. 101]

#### CONCLUSION

For the foregoing reasons, petitioner should be granted leave to prosecute his appeal *in forma pauperis*. Petitioner's good faith has been more than adequately established "by the presentation of any issue that is not plainly

frivolous" so as to survive dismissal in the case of a non-indigent litigant. *Ellis v. United States*, 356 U.S. 674.

Respectfully submitted,

/s/ Eugene Gressman  
EUGENE GRESSMAN  
1701 K Street, N.W.  
Washington 6, D. C.  
Counsel for Petitioner  
appointed by this Court.

August 31, 1960

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 102] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. 1481

[Title omitted]

OPPOSITION TO MEMORANDUM IN SUPPORT OF PETITION FOR  
LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—  
Filed September 19, 1960

Comes now respondent by its attorney, the United States Attorney, and makes this opposition to the petition for leave to prosecute an appeal in forma pauperis.

The memorandum filed by appointed counsel asserts two grounds in support of the petition. One relates to the references that the complaining witness had known appellant at Occoquan. The first reference, made in response to a prosecution question, was stricken on the prosecution's motion. The second reference was contained in a question asked by defense counsel. It, too, was stricken on the Government's motion. But defense counsel resisted, stating "Your Honor, I believe I have a right to ask where he knew this man." In response to this argument, the court made the third reference; and the complaining witness then volunteered the fourth. (Mem. 6.) Accordingly, defense counsel was himself in great measure responsible for the references. In these circumstances, they cannot constitute the plain error necessary for review in the absence of objection. Rule 52(b), Federal Rules of Criminal Procedure. Not only did defense counsel make no objection to the references, he also did not object to the court's instruction that they could be considered by the jury only insofar as they bore upon the credibility of the complaining witness. What [fol. 103] ever difference there may be between this instruction and one that the references could not be considered with respect to appellant is too insubstantial to overcome the absence of objection. Rule 30, Federal Rules of Criminal Procedure.

Second, the memorandum questions the constitutionality of Judge Jackson's assignment to the District Court. The premise of the argument is that Judge Jackson retired from the Court of Customs and Patent Appeals when it was a legislative court and that the 1958 legislation (28 U.S.C. § 211) making it an Article III court "can neither add to nor detract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later" (Mem. 16). The difficulty with this premise is that upon retirement Judge Jackson had a status as a retired judge which the 1958 legislation could and did affect. Appointed counsel does not suggest that the judges sitting on the Court of Customs and Patent Appeals at the time of the 1958 legislation did not thereby become judges of an Article III court. Yet none of them was nominated or confirmed as a judge of an Article III court. Nor was any of them renominated or reconfirmed after the legislation was enacted. Just as the 1958 legislation made them active judges of an Article III court, it constituted Judge Jackson a retired judge of an Article III court. The premise of appointed counsel's argument thus falls and, with it, the conclusion that a substantial question is presented. Other questions raised in the petition but not in the memorandum are, as the memorandum notes, without merit (Mem. 7-8).

Wherefore, it is respectfully submitted the petition for leave to prosecute an appeal in forma pauperis be denied.

/s/ Oliver Gasch (CWB)  
OLIVER GASCH,  
United States Attorney.

/s/ Carl W. Belcher  
CARL W. BELCHER,  
Assistant United States Attorney.

/s/ Stephen N. Shulman (CWB)  
STEPHEN N. SHULMAN  
Assistant United States Attorney.

[fol. 104] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

REPLY MEMORANDUM FOR PETITIONER—  
Filed September 19, 1960

On behalf of the petitioner, this memorandum is filed in reply to the respondent's opposition to the petition for leave to prosecute an appeal *in forma pauperis*.

Respondent's opposition consists solely of a denial of the merits of the two questions presented on behalf of petitioner. But such a denial is not relevant in the present posture of this case. The Supreme Court has warned against converting the "good faith" test of 28 U.S.C. § 1915 "into a requirement of a preliminary showing of any particular degree of merit." *Ellis v. United States*, 356 U.S. 674, 675. It is enough that the issues raised are plainly not frivolous so that the appeal would not be dismissed in the case of a nonindigent litigant.

Certainly the issues here raised do not fall into the plainly frivolous category. Whether the circumstances attending the revelation of petitioner's criminal record constitute plain error that can be corrected by this Court in the absence of objection is obviously a non-frivolous issue and respondent's simple denial of its merits cannot transform it into a frivolous one. So, too, the question as to the constitutionality of Judge Jackson's assignment is inherently a novel and substantial one, whatever re-  
[fol. 105] spondent may think of its merits. To put the matter simply, had this appeal been by a nonindigent defendant respondent could not have utilized its opposition herein to secure the dismissal of the appeal under Fed. Rules Crim. Proc. 39(a).

Even assuming some discussion of the merits is appropriate, however, respondent overlooks two vital facts in its opposition:

(1) The prosecutor knew or should have known, by virtue of the U.S. Commissioner's report, that the complaining witness had first met petitioner in prison. The major responsibility for setting into operation the chain of statements to that effect must fall on the prosecution. And the trial judge's failure to correct the impression thus gained by the jury and to give proper instructions may well be an error of the most egregious sort.

(2) This case does not involve the assignment of any judge of the Court of Customs and Patent Appeals sitting at the time of the 1958 legislation. Whether there are different considerations as to such judges does not have to be reached in this case. The only conceivable question here relates to a judge who retired long before the 1958 legislation. As to him the effect of that legislation on judges sitting in 1958 has no direct bearing. The constitutional question as to him is substantial and unanswered.

Respectfully submitted,

/s/ Eugene Gressman  
1701 K Street, N.W.  
Washington 6, D.C.  
Counsel for Petitioner  
appointed by this Court.

September 19, 1960.

[fol. 106]

CERTIFICATE OF SERVICE  
(omitted in printing)

[fol. 107] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Wilbur K. Miller, Bastian and Burger, Circuit  
Judges, in Chambers.

ORDER DENYING PETITION FOR LEAVE TO PROCEED IN  
FORMA PAUPERIS—September 23, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis and of the memoranda in support and the opposition, it is

ORDERED by the court that the petition for leave to prosecute an appeal in forma pauperis is denied.

Per Curiam.

[fol. 108] Clerk's Certificate to foregoing transcript  
omitted in printing

[fol. 109] • • • •

[fol. 110] SUPREME COURT OF THE  
UNITED STATES

No. 480 Misc., October Term, 1960

BENNY LURK, PETITIONER

VS.

UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA  
PAUPERIS AND GRANTING PETITION FOR WRIT OF  
CERTIORARI—January 23, 1961

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 669.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 35-A]

**SUPREME COURT OF THE UNITED STATES**

No. 669, October Term, 1960

**BENNY LURK, PETITIONER**

**vs.**

**UNITED STATES**

**JUDGMENT—May 29, 1961**

**ON WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.**

**THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the District of Columbia Circuit, and was argued by counsel.**

**ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby reversed; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the District of Columbia Circuit for proceedings in conformity with the opinion of this Court.**

**May 29, 1961**

**Dissenting opinion by Mr. Justice Frankfurter with whom Mr. Justice Harlan and Mr. Justice Stewart join.**

[fol. 36]

UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No. 16407

BENNY LURK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before: Wilbur K. Miller, Chief Judge, Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER SETTING CASE FOR HEARING—June 7, 1961

It is ORDERED by the court, *sua sponte*, that this case is set for hearing before the court en banc at 10:00 a.m. June 20, 1961, on the basis of the briefs and appendix filed in the Supreme Court in *Lurk v. United States*, No. 669, October Term, 1960, which briefs and appendix are incorporated in this case by reference.

It is FURTHER ORDERED by the court that counsel for appellant is allowed until June 12, 1961, to file a supplemental brief and that counsel for appellee is allowed until June 19, 1961, to file a supplemental brief. These briefs may be in mimeographed form and shall be served personally.

Per Curiam.

Dated: June 7, 1961

[fol. 37]

UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. 16,407

BENNY LURK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the United States District Court  
for the District of Columbia

OPINION—Decided June 22, 1961

*Mr. Eugene Gressman* (appointed by this court) for appellant.

*Mr. Charles T. Duncan*, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, and *Donald S. Smith*, Assistant United States Attorney, were on the brief, for appellee.

*Messrs. Archibald Cox*, Solicitor General, *Herbert J. Miller, Jr.*, Assistant Attorney General, *Oscar H. Davis*, Assistant to the Solicitor General, *Miss Beatrice Rosenberg*, *Philip R. Monahan*, *Mrs. Patricia R. Harris*, and *Mr. Richard W. Schmude*, Attorneys, Department of Justice, were on the brief for the United States, filed in the Supreme Court in *Lurk v. United States*, No. 669, Oct. Term, 1960, which was also considered by the court in this case.

[fol. 38] *Mr. Roger Robb* for the Chief Judge and Associate Judges of the United States Court of Customs and Patent Appeals, as *amici curiae*.

*Mrs. Francis Shea*, with whom *Mr. Richard T. Conway* was on the brief filed in the Supreme Court in *Lurk v. United States*, No. 669, Oct. Term, 1960, for *Marvin Jones*, Chief Judge of the United States Court of Claims, and *Samuel E. Whitaker*, et al., Judges of the United

States Court of Claims, as *amici curiae*, which was also considered by the court in this case.

*Mr. Bennett Boskey* was on the brief for Mark Coppedge, Jr., as *amicus curiae*, filed in the Supreme Court in *Lurk v. United States*, No. 669, Oct. Term, 1960, which was also considered by the court in this case.

Before WILBUR K. MILLER, Chief Judge, and EDGERTON, PRETTYMAN, BAZELON, WASHINGTON, DANAHER, BASTIAN and BUEGER, Circuit Judges, sitting *in banc*.

PER CURIAM: This case is here on appeal from the United States District Court for the District of Columbia, following remand from the Supreme Court of the United States. *Lurk v. United States*, — U.S. — (1961). We heard argument *in banc* on the merits of the two contentions advanced by appellant's able court-appointed counsel, namely, (1) that certain evidence was erroneously admitted at appellant's trial for robbery in the District Court, a trial which resulted in his conviction; and (2) that the assignment of a retired judge of the Court of Customs and Patent Appeals to preside at the trial was in violation of appellant's constitutional rights.<sup>1</sup>

[fol. 39] The first of these contentions is not tenable. The evidence complained of, which might perhaps have indicated to the jury that appellant had once been a prison inmate, was largely brought out by appellant's own trial counsel.<sup>2</sup> The first reference to the matter came during examination of the complaining witness by Government counsel.<sup>3</sup> The latter, claiming surprise, asked that the answer be stricken. This was done. Appellant's counsel,

<sup>1</sup> The assignment was made by the Chief Justice of the United States pursuant to 28 U.S.C. § 294(d). Retired "judges of the United States," including retired judges of the Court of Customs and Patent Appeals, are available for assignment. Appellant acknowledges that the statute purports to authorize assignments of the sort challenged here.

<sup>2</sup> Not of counsel on this appeal.

<sup>3</sup> The witness was asked where he had previously seen appellant, and replied "In Occoquan." A District of Columbia workhouse or jail is located in Occoquan, Virginia.

after amplifying the subject through his own examination, received a limiting instruction and expressed himself as satisfied. We find no error.

As to the remaining question, several constitutional issues were raised, centering on appellant's contention that the trial judge, having been appointed to the Court of Customs and Patent Appeals, said to be a court constituted under Article I of the Constitution, could not constitutionally sit on an "Article III" court, i.e., the United States District Court for the District of Columbia. Appellant relies on such cases as *Ex parte Bakelite Corporation*, 279 U.S. 438 (1929), and *Williams v. United States*, 289 U.S. 553 (1933). The Government and the *amici* (except Coppedge) argue that these cases are not controlling, and that the Court of Customs and Patent Appeals (as well as the Court of Claims) is a court created by Congress under Article III of the Constitution.

Deeming it our duty to dispose of the case with as complete an avoidance as may be of constitutional questions, see *Harmon v. Brucker*, 355 U.S. 579 at 581 (1958),<sup>4</sup> we affirm the conviction and determine that the trial judge was qualified to sit, on the following ground: that the [fol. 40] assignment must in any event be sustained under the plenary power of Congress over the District of Columbia and its courts, pursuant to Article I, Sec. 8, Cl. 17, of the Constitution.

The judge in this case was appointed to the Court of Customs and Patent Appeals in 1937. At that time there was in force a statute specifically providing:

"The judges of the United States Court of Customs and Patent Appeals, or any of them, whenever the business of that court will permit, may, if in the judgment of the Chief Justice of the United States the public interest requires, be designated and assigned by him for service from time to time, and until he shall otherwise direct, in the Supreme Court of the District of Columbia or the United States Court of Appeals for the District of Columbia, when

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<sup>4</sup> We are mindful, too, of our duty to expedite the hearing and disposition of appeals in criminal cases.

requested by the Chief Justice of either of said courts." 28 U.S.C. § 22 (1934 ed.).

Thus, the post to which the trial judge was appointed by the President and confirmed by the Senate was one which clearly included the possibility and prospect of judicial service on the Supreme Court of the District of Columbia, now the United States District Court for the District of Columbia. The Congress spoke of "service" on that court—by which it must have meant the exercise of every type of jurisdiction possessed by the court.<sup>5</sup> The statute is now not limited to the District of Columbia but includes assignments to judicial service throughout the country.<sup>6</sup> Be that as it may, we think that at all [fol. 41] relevant times Congress has specifically made available the services of the judges of the Court of Customs and Patent Appeals to meet the needs of the United States District Court for the District of Columbia. We think there can be no doubt of the power of Congress to do so, in view of the broad sweep of its legislative authority over the Federal District. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838); *O'Donoghue v. United States*, 289 U.S. 516, 545 (1933); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 443 (1923).

We need not examine the other contentions of the parties.

*Affirmed.*

Circuit Judge Fahy took no part in the hearing or decision of this case.

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<sup>5</sup> The quoted statute goes on to provide:

"During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)."

<sup>6</sup> See 28 U.S.C. §§ 291-296 (1958 ed.).

[fol. 42]

UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No. 16,407

District Court Criminal No. 180-60

BENNY LURK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court  
for the District of Columbia

Before: Wilbur K. Miller, Chief Judge, and Edgerton,  
Prettyman, Bazelon, Washington, Danaher, Bastian and  
Burger, Circuit Judges, sitting *in banc*.

JUDGMENT—June 22, 1961

This cause came on to be heard before the court in  
*banc* on the record on appeal from the United States  
District Court for the District of Columbia, and was  
argued by counsel.

On consideration whereof It is ORDERED and ADJUDGED  
by this court that the judgment of the District Court  
appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: June 22, 1961

Each member of the court reserves the right to  
file a statement of his views at a later date.

Circuit Judge Fahy took no part in the hearing  
or decision of this case.

[fol. 43]

UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. 16,407

BENNY LURK, APPELLANT

IV.

UNITED STATES OF AMERICA, APPELLEE

Statement of Circuit Judge Prettyman,  
Concurring in Opinion Filed June 22, 1961

CONCURRING OPINION—Filed July 17, 1961

PRETTYMAN, *Circuit Judge*, concurring: A bit of history is pertinent. In 1921, when this court had three judges and our District Court had six judges, a bill<sup>1</sup> to provide additional judges for certain judicial districts (not including this one) was introduced in the House of Representatives. During floor debate on the bill Representative Volstead proposed an amendment which would have allowed the Chief Justice of the United States to designate judges of the Court of Customs Appeals (now the Court of Customs and Patent Appeals) to serve on any United States District Court or on the Supreme Court of the [fol. 44] District of Columbia and the Court of Appeals for the District of Columbia.<sup>2</sup> The legislative record indicates that the Senate rewrote the House bill, eliminating the amendment here pertinent.<sup>3</sup> In conference the amendment was reinserted in a limited form, *i.e.*, limited to designations to the courts of the District of Columbia.<sup>4</sup> No further discussion appears to have occurred on the

<sup>1</sup> H. R. 9103, 67th Cong., 1st Sess.

<sup>2</sup> 62 CONG. REC. 207 (1921).

<sup>3</sup> See S. REP. No. 497, 67th Cong., 2d Sess. (1922).

<sup>4</sup> See H. R. REP. No. 1152, 67th Cong., 2d Sess. (1922).

floor of either House. The section as thus written was enacted.<sup>5</sup> The section was reenacted in substantially the same form when Title 28 was "revised, codified, and enacted into law" in 1948.<sup>6</sup> In the present Title 28 the limited section has been superseded by a broad power to designate judges of the Court of Customs and Patent Appeals to any federal Court of Appeals or District Court.<sup>7</sup>

Subsequent to the Act of 1922 judges of the Court of Customs Appeals were regularly designated to sit on this court. Our minutes show that on October 12, 1922, Judge James F. Smith first sat here. Judge George E. Martin (who was later to be appointed Chief Justice of this court) first sat here on October 23, 1922, and on November 2nd of that year Judge Orion M. Barber first sat. Other judges of the Court of Customs Appeals were from time to time designated, and by 1924 that court's full complement of judges had been designated to serve on this court. These judges were listed as Associate Justices of this court in Volumes 52 through 58 of our official Reports, with the notation that they had been [fol. 45] designated here by the Chief Justice pursuant to the Act of September 14, 1922. Similar listings of those judges as judges of this court appear in the Federal Reporter from 284 Fed. to 32 F. 2d. Leafing through the reports of our opinions one readily finds many cases in which judges of the Court of Customs Appeals sat on this court. By an Act of June 19, 1930,<sup>8</sup> the membership of this court was increased to five judges. In Volume 59 of our Reports, which is for April, 1929, to December, 1930, and thenceforward, the listings of the Customs Court judges as judges of this court were discontinued.

Similar designations were made to our District Court, then the Supreme Court of the District of Columbia. Judge Smith was assigned by the Chief Justice on March

<sup>5</sup> Act of Sept. 14, 1922, 42 STAT. 837, 839.

<sup>6</sup> 62 STAT. 869.

<sup>7</sup> S. REP. No. 2309, 85th Cong., 2d Sess. 4 (1958). Act of August 25, 1958, 72 STAT. 848.

<sup>8</sup> 48 STAT. 785.

14, 1925, to serve there "during the absence and inability to serve" of Justice Siddons; and on January 9, 1928, Judge William J. Graham and Judge Charles S. Hatfield were so assigned. These judges sat in many trials for many years.

Although at no point in the debate on the bill above discussed was it indicated that any member of the House was aware of the distinction between constitutional and legislative courts, the question whether judges appointed to the Customs Court were qualified to sit on District Courts was thoroughly discussed. The suggestion was that judges appointed to the Customs Court were chosen to perform certain narrow tasks and might not be qualified to exercise the broad powers of a federal District or Circuit Judge. The matter was debated, with eloquent espousals of the abilities of these judges. Portions of the debate are printed in an Appendix hereto, but it is sufficient here to note that, after both sides of this argument were fully presented, the House voted to accept the amendment.

[fol. 46] So, as a matter of history, Congress specifically provided that judges of the Court of Customs Appeals might sit on the courts of the District of Columbia, over which Congress had complete legislative power as well as its power to establish inferior courts in the Judicial Branch of the Government. Such judges did in fact many years ago and in many cases sit as judges, on both the trial court of general jurisdiction (now the District Court) and the appellate court (this court) in this jurisdiction. So the designation of Judge Jackson to sit on our District Court, and his sitting there, is nothing new. The practice has been occurring off and on for almost forty years. Pursuant to historical precedent he might have been designated to sit on this court; as, indeed, he was. See, for example, *Hamilton v. United States*, 102 U.S. App. D.C. 298, 252 F.2d 862, cert. denied. 357 U.S. 939 (1958); *Payne v. District of Columbia*, 102 U.S. App. D.C. 345, 253 F.2d 867 (1958); *Rothe v. Ford Motor Company*, 102 U.S. App. D.C. 331, 253 F.2d 353 (1958).

[fol. 47]

## APPENDIX

The following are excepts from debate in the House of Representatives on December 10, 1921, 62 Cong. Rec. 190-191, 207-209:

"Mr. VOLSTEAD. \* \* \*

"\* \* \* We purpose to offer as an amendment to this bill a provision, which has been approved by the Judiciary Committee, authorizing the judges of the Court of Customs Appeals to function in the district courts as judges of those courts. Those judges have had but very little to do for a number of years. There are five of them living here in this city drawing a salary, I believe, of \$8,000 per year. They are capable men, just as capable as any of the ordinary district-court judges. The reputation they bear is very good. They can easily do work in West Virginia to help clean up the court dockets there and in some of the adjoining States. It is our purpose to make those judges function the same as the other judges that we have on the pay roll. With those judges located here, there would be no difficulty whatever in supplying an additional judge, if necessary, down in West Virginia. It is true that as soon as the new tariff bill passes, for some months, perhaps for a year or two, they may have considerable work in the Court of Customs Appeals, but as soon as the construction of the new tariff law is fixed they will have considerable leisure. At least that has been our experience. During the last few years those judges have been without much of any work, and during the last Congress one of these came to me and asked me to introduce a bill to give them an opportunity to be assigned to district and circuit work. We passed that bill in the House, but for some reason or other it failed in the Senate.

\* \* \* \*

"Mr. HUSTED. Does the gentleman feel sure that the judges who sit on the bench of customs appeal are as well qualified to act as the district judges?

[fol. 48] "Mr. VOLSTEAD. There is no question in my mind about that.

"Mr. HUSTED. They handle but two classes of cases, reappraisement, and classification cases under the tariff law.

"Mr. VOLSTEAD. I know, but they are high-class lawyers; they were men who could have been put on the district bench or circuit bench when appointed.

"Mr. HUSTED. But they have not been practicing for years. They have been serving on this customs court of appeals.

\* \* \* \*

"Mr. VOLSTED. They are as good lawyers as the average district judge trying such questions. There is no doubt of their qualification. The Chief Justice, and I do not think it is improper for me to say to you that he called my attention to the fact that these men were high-grade men and ought to be put to work, and that they were capable of serving in the district courts or in the supreme court or court of appeals in this district. And we hope this House will accept that amendment and allow those men to do this work, and if they are given the work there is absolutely no excuse, even with the congestion that exists to-day, for providing an additional judge for West Virginia.

\* \* \* \*

"Mr. HUSTED. Mr. Chairman, I think this amendment should not prevail. The gentlemen who are now on the Customs Court of Appeals may be very able lawyers. Personally, I do not know as to that, but I do know this, that they need not be necessarily very great lawyers to serve well in that court. They have but two classes of cases to pass upon. One class is that of cases of reappraisement of the valuation of merchandise imported into the United States. The other is the classification of that merchandise. They deal almost exclusively with questions of fact and very little with questions of law. They may have

[fol. 49] been able men and able lawyers when they went on the bench, but they have been out of touch with

the practice of the law for many years, and I am very sure that in my own State and in my own district we would not want one of these men assigned to come there and try these vastly important cases—admiralty cases and patent law cases—when they have not been in touch with the practice of the law for years.

"Why, by this amendment we are practically creating a number of district judges. We should not create them in that way. These men were not appointed because they were well qualified to be district judges. They were appointed because they were well qualified to pass upon questions arising under the tariff law. I do not think we would aid the administration of justice by enacting an amendment of this kind. I do not think we would facilitate the transaction of our important business. I think it would be a bad precedent, an unwise thing to do. I think it would lower the standard of judicial service and accomplishment, and I feel that the amendment should be defeated.

\* \* \* \*

"Mr. RAKER. Mr. Chairman and gentlemen of the committee, I did not rise to discuss the amendment I offered to the Volstead amendment and shall not discuss it. It is in the same language as the other sections, and is necessary. It is wholly immaterial to me what the House does with it. But what I do rise to say is this: The Chief Justice of the United States Court of Customs Appeals, Judge DeVries, was a former and able Member of this House, where he had a high standing. He has a high standing as a member of the bar of California. None better. Another member, Judge Smith, was Governor General of the Philippines, and for years stood at the head of the bar of San Francisco as a lawyer. The other two men on the bench of that court, one of them from Vermont, Judge Barber, and the other from Ohio, Judge Martin, and each of them stood at the head of the profession in the State from which he came. The statement that only two questions are involved before this court is a mistaken statement. Read the

[fol. 50] reports of the decisions of that court, nine volumes now published and one partly published, and you will find that all the questions of evidence in civil and equity cases are involved in those decisions. All these men are the peers of any of the judges of the district courts of the United States as men, in ability, and as civil and equity lawyers, all men of wide experience, able lawyers, and able and worthy judges, and they would be a credit to the district bench wherever they might be sent to preside, and they can give the very best service. I am for this amendment and hope it will be adopted.

"Mr. CURRY. Mr. Chairman, I have the honor of the personal acquaintance and friendship of three of the members of the Court of Customs Appeals. There are no abler lawyers in the United States of America than those three men. They would grace the Supreme Bench of the United States. I had the honor to succeed one of these gentlemen as a Member of this House. There is no question as to their ability, there is no question that they could perform the duties of United States district judges as well as anyone who might be selected. The only question to be considered by the committee is as to whether the duties of the Court of Customs Appeals will permit of their devoting their time to other work after the tariff bill shall have been enacted. I can not sit quiet and hear their ability attacked without stating that from my personal knowledge there are no better lawyers in the United States than these three men, and none better qualified to perform the duties of district judges should this amendment be adopted and any of them should be assigned to hear and decide any case that may come before such court.

"Mr. WINGO. [Opposed the amendment.]"

The amendment was agreed to.

[fol. 51-52] \* \* \* \*

[fol. 53] Clerk's Certificate to foregoing  
transcript omitted in printing

[fol. 54]

SUPREME COURT OF THE UNITED STATES  
• • • •

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA  
PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—  
October 9, 1961

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 481.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 9, 1961

COPY

~~RECEIVED OCT 22 1961~~  
**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1961**

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**No. 481**

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**BUNNY LURK,**

*Petitioner*

**vs.**

**UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**BRIEF FOR THE PETITIONER**

---

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Court of Appeals

December, 1961

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IN THE SUPREME COURT OF THE UNITED STATES  
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BENNY LURK,

*Petitioner,*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF FOR THE PETITIONER**

---

**Opinion Below**

The Court of Appeals for the District of Columbia Circuit rendered an opinion (R. 38) and a judgment (R. 42) on June 22, 1961. The opinion has not yet been officially reported. On July 17, 1961, Circuit Judge Prettyman filed a concurring opinion (R. 43), also not yet officially reported.

**Jurisdiction**

The judgment of the Court of Appeals was entered on June 22, 1961 (R. 42), and the petition for a writ of certiorari was filed on July 21, 1961. The petition, together with the motion for leave to proceed *in forma pauperis*, was

granted on October 9, 1961. 368 U.S. 815; R. 50. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

### Questions Presented

1. Whether any provision of the Constitution of the United States permits the assignment, pursuant to 28 U.S.C. §294(d), of a judge who retired from the Court of Customs and Patent Appeals prior to 1958 to sit on the United States District Court for the District of Columbia as the presiding judge at petitioner's criminal trial.
2. Whether, if the assignment of a retired or active judge of the Court of Customs and Patent Appeals to preside over a criminal trial in a federal district court located in any of the various states of the union be deemed unconstitutional, the constitutional power of Congress to legislate for the District of Columbia nevertheless authorizes the assignment of such a judge to preside over a criminal trial in the federal district court in the District of Columbia.

### Constitutional and Statutory Provisions Involved

*Constitution of the United States, Article I,  
Sec. 8, Cl. 17:*

- The Congress shall have power . . .
- To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall

be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . .

---

*Constitution of the United States, Article III:*

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

\* \* \* \* \*

*28 U.S.C. §211, as amended in 1958:*

**§211. Appointment and number of judges**

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

*28 U.S.C. §293(a), as amended:*

**§293. Judges of other courts**

(a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

28 U.S.C. §294(d), as amended:

§294. Assignment of retired Justices or judges to active duty

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

### **Statement of the Case**

*(1) The history of this litigation*

This case is here for the second time. It now comes before this Court following consideration last term of the case at an earlier juncture and a remand to the Court of Appeals for a hearing on the merits of petitioner's appeal from his conviction. *Lurk v. United States*, 366 U.S. 712. The briefs

and record in the proceeding last term, No. 669, Oct. Term 1960, give the full background of this case.<sup>1</sup>

Petitioner was tried and found guilty of the crime of robbery, as defined in 22 D.C. Code §2901, in the District Court for the District of Columbia.<sup>2</sup> Presiding over that trial was Judge Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals. He had been appointed to that court in 1937 and retired therefrom in 1952. By order of the Chief Justice of the United States, acting pursuant to 28 U.S.C. §294(d), Judge Jackson was assigned to serve as a judge of the District Court for the District of Columbia during the year 1960. Petitioner's trial took place on March 22, 1960.

Following his trial and conviction, petitioner sought to prosecute an appeal *in forma pauperis*. Judge Jackson denied this request. Petitioner then renewed the effort in the Court of Appeals. At that point the undersigned counsel was appointed to represent the petitioner and to file a memorandum in support of the request. In that memorandum, counsel suggested that one non-frivolous issue justifying the grant of leave to appeal involved the constitutionality of Judge Jackson's assignment to the District Court. But the Court of Appeals summarily denied leave to appeal *in forma pauperis*.

This Court granted certiorari to review the action of the Court of Appeals. *Lurk v. United States*, 365 U.S. 802.

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<sup>1</sup> By order of this Court, 368 U.S. 815, petitioner has been granted leave to use the record in No. 669 in connection with the instant case. That record has been reprinted as part of the record in this case, No. 481, Oct. Term 1961, and appears at R. 1-35.

<sup>2</sup> Petitioner was charged with having stolen from one Charles C. Edgeworth certain property, including cash, of the value of about \$58.31. Following conviction by a jury, petitioner was sentenced by Judge Jackson to a prison term of not less than 4 years and 9 months and of not more than 14 years and 3 months. R. 18.

The issue as to the constitutionality of the assignment was fully briefed and argued by the parties on the chance that this Court, should it conclude that the court below erred in denying leave to appeal, might deem it appropriate to resolve the merits of this constitutional issue rather than to remand the matter for consideration by the Court of Appeals. A majority of this Court, however, simply reversed the judgment of the Court of Appeals and remanded the case to that court, citing *Ellis v. United States*, 356 U.S. 674. Three Justices dissented, believing that the constitutional issue should be decided by the Court then and there and that the lower court's views on the matter could be of no effective assistance to this Court. *Lurk v. United States*, 366 U.S. 712 (May 29, 1961).

The issuance of this Court's judgment of reversal was expedited by agreement of the parties. On June 7, 1961, just nine days after the entry of that judgment, the panel of the Court of Appeals that had originally denied petitioner leave to appeal entered an order granting such leave in light of this Court's action. Simultaneously, the Court of Appeals *sua sponte* ordered that the case be "set for hearing before the court *en banc* at 10:00 a.m. June 20, 1961, on the basis of the briefs and appendix filed in the Supreme Court in *Lurk v. United States*, No. 669, October Term, 1960, which briefs and appendix are incorporated in this case by reference." R. 37. The parties were also allowed to file supplemental briefs in mimeographed form. The judges of both the Court of Claims and the Court of Customs and Patent Appeals were permitted to appear *amicus curiae* and to participate through counsel in the oral argument.

Oral argument took place as scheduled on June 20, 1961, before the court *en banc*, Circuit Judge Fahy not participating. Two days later, June 22, 1961, the Court of Appeals

issued a *per curiam* opinion affirming the conviction. R. 38-41. As a premise to its discussion of the constitutionality of Judge Jackson's assignment, the court stated that its duty was "to dispose of the case with as complete an avoidance as may be of constitutional questions." It merely noted the basic issue as to the constitutionality of assigning a retired legislative court judge to sit on and perform the Article III functions of a constitutional court. The court purported not to answer that issue by ruling that the assignment of Judge Jackson "must in any event be sustained under the plenary power of Congress over the District of Columbia and its courts, pursuant to Article I, Sec. 8, Cl. 17, of the Constitution."

Pointing to the fact that at all relevant times legislation has existed specifically authorizing the assignment of judges of the Court of Customs and Patent Appeals to meet the needs of the District Court for the District of Columbia,<sup>3</sup> the court concluded that "there can be no doubt of the power of Congress to do so, in view of the broad sweep of its legislative authority over the Federal District." The court also made plain its view that such authority permitted a judge so assigned to exercise "every type of jurisdiction possessed by" the District Court for the District of Columbia.<sup>4</sup>

On July 17, 1961, Circuit Judge Prettyman filed a concurring statement which reviewed past assignments of

<sup>3</sup> Petitioner has never contested the existence or purported thrust of such legislation. Nor has there been any dispute over the fact that, as detailed in Circuit Judge Prettyman's opinion, numerous assignments have been made over the years of judges of the Court of Customs and Patent Appeals to sit on the District Court.

<sup>4</sup> The Court of Appeals further held that the other issue raised on petitioner's behalf—relative to the trial references to petitioner's earlier prison record—was without merit. That issue is not renewed before this Court.

judges of the Court of Customs and Patent Appeals to the District Court for the District of Columbia and concluded that the designation of Judge Jackson to sit on the District Court and to preside over this case "is nothing new." R. 43-49.

On October 9, 1961, this Court granted the motion for leave to proceed *in forma pauperis* and the petition for certiorari. 368 U.S. 815. Simultaneously, the Court granted the petition for certiorari in No. 242, *Glidden Co. v. Zdanok*, limited to the question as to whether the participation by a Court of Claims judge in a proceeding in the Court of Appeals for the Second Circuit vitiates the judgment of the Court of Appeals. 368 U.S. 814.

## (2) *The facts as to Judge Jackson*

As a backdrop to a consideration of the constitutional issue in this case, certain uncontested facts as to Judge Jackson's appointment to and resignation from the Court of Customs and Patent Appeals and as to his assignment to the District Court below must be understood.

Judge Jackson was nominated by the President and confirmed by the Senate as a judge of the Court of Customs and Patent Appeals in 1937 and entered upon his duties on that court on December 15, 1937.<sup>5</sup> His commission, a copy of which was supplied to the court below by counsel for the *amicus* judges of the Court of Customs and Patent Appeals, reads as follows:

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<sup>5</sup> Judge Jackson is listed in 92 F.2d XI as having been "appointed" to the Court of Customs and Patent Appeals on December 14, 1937. But according to the records of that court, he took the oath of office and entered upon his duties on December 15, 1937. As indicated above, his commission was signed by the President on December 14, 1937.

FRANKLIN D. ROOSEVELT

President of the United States of America

To all who shall see these Presents Greeting:

Know Ye; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Joseph R. Jackson, of New York, I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Judge, U. S. Court of Customs and Patent Appeals, and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Joseph R. Jackson, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed,

Done at the City of Washington this fourteenth day of December, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the United States of America the one hundred and sixty-second.

/s/ Franklin D. Roosevelt

By the President:

/s/ Homer Cummings  
Attorney General

He retired from the Court of Customs and Patent Appeals as of April 1, 1952. See 193 F.2d XV.

At various times thereafter, and more particularly during the entire year of 1960 (during which petitioner's trial took place before him), Judge Jackson was assigned by the Chief Justice of the United States to serve as a District Judge of the United States District Court for the District of Columbia. The assignment in question, a copy of which was filed in the office of the Clerk of the District Court on December 8, 1959, reads as follows:

**DESIGNATION OF A RETIRED JUDGE OF THE COURT OF  
CUSTOMS AND PATENT APPEALS TO SERVE AS A DISTRICT  
JUDGE OF THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA**

The Chief Judge of the United States Court of Appeals for the District of Columbia Circuit having certified that there is a necessity for the designation and assignment of a retired judge on the Roster of Senior Judges to serve as a district judge of the United States District Court for the District of Columbia during the period beginning January 1, 1960, and ending December 31, 1960; and the Honorable Joseph R. Jackson, Retired Judge of the Court of Customs and Patent Appeals, whose name appears upon the Roster of Senior Judges as available for duty from time to time in the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia, having expressed his willingness to undertake the performance of such judicial duties beginning January 1, 1960, and ending December 31, 1960;

Now, THEREFORE, pursuant to the authority vested in me by Title 28, United States Code, Sec. 294(d), I do hereby designate and assign the Honorable Joseph R. Jackson to serve as a district judge of the United

States District Court for the District of Columbia and discharge the official duties thereof beginning January 1, 1960, and ending December 31, 1960, and for such further time as may be required to complete unfinished business.

/s/ Earl Warren  
Chief Justice of the  
United States

Dated: Dec. 7, 1959

A similar designation of Judge Jackson to serve as a judge of the District Court from January 1 to December 31, 1961, has been signed by the Chief Justice and filed in the District Court.

### **Summary of Argument**

1. At the heart of the constitutional issue in this case is the historic doctrine of separation of governmental powers. As part of that doctrine, it is essential that those possessed of legislative power not be allowed to exercise the power and function given to the judicial branch of government. Growing out of this doctrine is the issue in this case—whether the judicial power of the United States may, by assignment, be exercised by an individual invested only with legislative powers as expressed in a legislative tribunal.

2. Article III tribunals, often called constitutional courts, are those judicial bodies established by or pursuant to Article III of the Constitution. For all practical purposes, they consist of the Supreme Court of the United States, the eleven courts of appeals, and the various district courts. The power that they exercise is the judicial power of the United States, the power to adjudicate "Cases" and "Con-

troveries" detailed in Section 2 of Article III. While it is for Congress to say how much of, and on what conditions, this judicial power shall be exercised, Congress cannot compel these courts to adjudicate any matter not classified as a case or controversy. Nor can Congress call upon those courts to perform any legislative, administrative or executive functions.

Article III courts have much freedom in exercising their power. To implement that freedom, Article III, Section 1, provides that judges of these courts shall hold office during good behavior and that their compensation shall not be diminished while in office. In exercising their power as activated by Congress, these courts have at their disposal all the procedural and substantive devices associated with our federal courts—including the Federal Rules of Civil and Criminal Procedure and the jury trial techniques.

3. Of an entirely different constitutional origin are those tribunals that have been denominated Article I or legislative in nature. These courts are invariably established by Congress to help carry out some specific function or power of the Federal Government, such as the power to lay duties on imports or to pay the debts of the United States.

As stated by Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511, 546, these legislative courts "are incapable of receiving" the judicial power exercisable by Article III tribunals. Hence they may be given a variety of functions by Congress, not being limited to those judicial in nature. They sometimes perform legislative and administrative duties and render advisory opinions. And they may also be given jurisdiction to decide cases and controversies involving individuals and the Government, matters which are also cognizable by Article III courts. The fact that a legislative court has some of the same type of juris-

diction as possessed by Article III courts, however, does not render it an Article III court itself. It merely reflects the freedom which Congress has with respect to legislative tribunals.

What remains critical as to legislative courts is that they are established to help implement a special or particular power of Congress, rather than to execute the broad range of judicial power specified in Article III. In a real sense, therefore, a legislative court judge has no greater constitutional status than an administrative or executive officer of the Government. His tenure and his compensation are subject to the wishes of Congress. And he receives no rights or powers from Article III of the Constitution. His function is limited to adjudicating matters within the narrow range of the particular power of Congress with respect to which the court on which he sits was created. He does not have the broad procedural and substantive devices possessed by Article III judges to help resolve these matters.

4. The District Court for the District of Columbia has been found to be an Article III tribunal, capable of exercising the judicial power of the United States. *O'Donoghue v. United States*, 289 U.S. 516. Its judges are entitled to the protections of Article III, Section 1. In addition, certain administrative or non-judicial functions may also be given to this court, by virtue of the plenary power of Congress over the District of Columbia. Art. I, Sec. 8, Cl. 17. But the possession of such non-judicial powers does not make it any less an Article III tribunal. There is no incompatibility between Article III and Article I, Section 8, Clause 17.

The view of the court below that Article I, Section 8, Clause 17 alone justified the assignment of a legislative

court judge to perform the Article III functions of the District Court for the District of Columbia is unwarranted. Since Article III is applicable to this situation, such an assignment must be tested by the principles growing out of Article III.

Certainly a criminal trial involves the exercise of the District Court's Article III judicial power. The fact that the crime is one outlawed by the District of Columbia Code rather than by Title 18 of the United States Code does not make the process of adjudication any less judicial or Article III in nature. The legislative functions of this court relate to far different matters—administrative matters, probate and divorce jurisdiction, and appointment of the school board. A criminal trial, however, is of the very essence of the judicial function. Here Congress has called upon the District Court to exercise that judicial function to help execute its power with respect to the District of Columbia. It has done so in the same way as it has called on this and other federal district courts to exercise their judicial function to help execute its power with respect to interstate commerce, bankruptcy, etc.

5. The Court of Customs and Patent Appeals has been found to be a tribunal of a legislative or Article I nature. *Ex parte Bakelite Corp.*, 279 U.S. 438; *Williams v. United States*, 289 U.S. 553, 571. It is simply a tribunal designed to implement the narrow Congressional power to lay and collect duties on imports and is not designed to execute the gamut of the judicial power of the United States as possessed by federal district courts and federal courts of appeals. Congress at the start recognized that it was really creating an administrative board rather than an Article III court, and its subsequent treatment of the tribunal has confirmed that recognition. Thus Congress cut the salaries of the judges of this court in 1932, and only in 1930 did it

provide life tenure for the judges. Many of the powers of this court, such as those involving patent and trademark appeals, have always been considered non-reviewable administrative rulings.

6. The 1958 effort by Congress to designate the Court of Customs and Patent Appeals as a court established under Article III was totally ineffective. As the *Bakelite* case determined, the expressed intention of Congress is not decisive; rather, the decisive element is the constitutional power exercised in the establishment of the court. Here nothing has happened to change the *Bakelite* conclusion that the court was established to implement Article I power over import duties. The 1958 legislation was expressly premised on a continuation of the same powers and jurisdiction of the court; hence it was meaningless.

7. Since a judge can acquire no greater powers than the court to which he is appointed, Judge Jackson cannot be considered ever to have acquired any but legislative powers by virtue of his appointment to and service on the Court of Customs and Patent Appeals. And when he retired from that court, he took with him only the legislative powers he had acquired. At no time has he ever been eligible for, or capable of receiving, Article III judicial power. For that reason, therefore, any attempt by Congress to authorize his assignment to an Article III tribunal so as to exercise Article III judicial power must be considered invalid. Such an attempt negates the basic doctrine of separation of powers.

8. Any other conclusion would create a host of problems. Moreover, any difficulties stemming from an invalidation of this assignment can be met when and if they arise. The doctrine of separation of powers is too important to be disregarded for slight reasons.

9. Petitioner's trial in the District Court before a judge who lacked constitutional authority to exercise Article III power involved a denial of due process of law. See *Donegan v. Dyson*, 269 U.S. 49, 54-5.

## ARGUMENT

### 1.

#### **The General Nature of the Constitutional Issue.**

At the heart of the constitutional issue in this case is the historic doctrine of separation of governmental powers into three grand departments of the executive, the legislative and the judicial. "This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Philippine Islands*, 277 U.S. 189, 201, namely, to preclude a commingling of these essentially different powers of government in the same hands." *O'Donoghue v. United States*, 289 U.S. 516, 530.

Critical to the successful working of this triadic form of government is the insistence "that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." *Kilbourn v. Thompson*, 103 U.S. 168, 191. Thus those entrusted with legislative power have consistently been held incapable of performing the law enforcement functions of the executive department or the adjudicatory functions of the judicial branch. See *Watkins v. United States*, 354 U.S. 178, 187. Likewise, jurisdiction to exercise the judicial power of the United States expressed in Article III of the Constitution cannot be conferred on any executive officer or administrative or execu-

tive branch, or on any judicial tribunal other than one established under Article III. *Williams v. United States*, 289 U.S. 553, 578. And, by the same token, the federal courts cannot exercise or participate in "functions which are essentially legislative or administrative." *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 469, and cases cited; *United Steelworkers of America v. United States*, 361 U.S. 39, 43.

There is, of course, no absolute or universal formula for determining in all cases the lines of demarcation between the various governmental functions. The science of government being an intensely practical one, many fluctuating and vague lines have been established. And, particularly with respect to legislative power, delegations of functions have frequently been validated. But of all the powers of government, the judicial power is the most ascertainable, the most clearly defined, and the least delegable. And it is within the finite realm of judicial power, as defined in Article III of the Constitution, that we find the constitutional question posed by this case.

That question is both narrow and significant. Stated in most elemental terms, the question is whether the judicial power of the United States may, by assignment, be exercised by an individual invested only with legislative or Article I powers. There is here no problem of delegation, or of the exercise of administrative or quasi-judicial power. What must be decided is whether matters which are of the traditional concern of federal courts—matters denominated as "Cases" or "Controversies" by Article III—can be adjudicated and resolved by any individual or judge other than one nominated and confirmed as a member of an Article III tribunal. In this very basic sense, this question goes to the core of the separation of powers concept.

## 2.

**The Nature of Article III Tribunals.**

More specifically, this case brings into focus the constitutional significance of the differences between Article III and Article I tribunals, and the judges performing the respective functions thereof.

Article III tribunals, sometimes called constitutional courts, are those judicial bodies established by or pursuant to Article III of the Constitution. They consist of the Supreme Court of the United States and "such inferior Courts as the Congress may from time to time ordain and establish." Art. III, Sec. 1. And the power that they exercise is the judicial power of the United States, the power to adjudicate and resolve the "Cases" and "Controversies" detailed in Section 2 of Article III.<sup>6</sup> This includes the power "to try cases and controversies between individuals and between individuals and the Government" and the "trial of criminal cases." *Toth v. Quarles*, 350 U.S. 11, 15.

<sup>6</sup> As stated by Mr. Justice Frankfurter, concurring in *United Steelworkers of America v. United States*, 361 U.S. 39, 60:

"What proceedings are 'Cases' and 'Controversies' and thus within the 'judicial Power' is to be determined, at the least, by what proceedings were recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems. Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters such as were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'."

See also concurring opinion of Mr. Justice Frankfurter in *Youngstown Co. v. Sawyer*, 343 U.S. 579, 594.

It is for Congress to say, of course, how much of and on what conditions this judicial power of the United States shall be exercised by Article III tribunals. Congress can qualify, extend or withhold the jurisdiction of these courts as it sees fit. *Lockerty v. Phillips*, 319 U.S. 182, 187, and cases cited. "The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law." *Cary v. Curtis*, 3 How. 236, 245.

But while Congress can freely limit and apportion the exercise of the judicial power of the United States, it cannot authorize or compel Article III tribunals to accept jurisdiction over matters going beyond the justiciable "Cases" and "Controversies" set forth in Article III.<sup>7</sup> From the earliest days to the present, this Court has rejected all efforts to impose on these tribunals powers which by their nature are legislative, executive or administrative. *Hayburn's Case*, 2 Dall. 409; *United States v. Yale Todd*, reported in footnote to *United States v. Ferreira*, 13 How. 40, 52; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 440-3; *United Steelworkers of America v. United States*, 361 U.S. 39, 43. Such courts cannot render advisory opinions. *Muskrat v. United States*, 219 U.S. 346; *In re Summers*, 325 U.S. 561. And their judgments cannot be subject to legislative or executive revision. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716; *Gordon v. United States*, 2 Wall. 561. Thus Congress may legislate as to the authority and jurisdiction of Article III tribunals only within the Article III boundaries of judicial power.

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<sup>7</sup> Constitutional courts established under Section 2 of Article III "share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, . . . with no power in Congress to provide otherwise." *Ex parte Bakelite Corp.*, 279 U.S. 438, 449.

Moreover, to the extent that a case or controversy requires the exercise of the judicial power defined by Article III, "jurisdiction thereof can be conferred only on courts established in virtue of that article, and . . . Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since to repeat the language of Chief Justice Marshall in *American Ins. Co. v. Canter*, 1 Pet. 511, 'they are incapable of receiving it.'" *Williams v. United States*, 289 U.S. 553, 578. And see *Ex parte Randolph*, 2 Brock. 447, Fed. Cas. No. 11,558 (Chief Justice Marshall, sitting on the circuit). Confining Article III controversies to Article III tribunals reflects the fact that only these bodies have all the legal facilities appropriate to resolving such matters. The judicial power of the United States is not merely the power to enforce some mandate or authority of Congress; it is the power to adjudicate a case or controversy in light of all relevant considerations—including, but not necessarily limited to, Congressional mandates. Within the lawful scope of its jurisdiction, an Article III court can exercise this power in any way it deems appropriate. Such freedom is shared by no other courts in the federal system.

To implement this independence of action in the exercise of Article III judicial power, Section 1 of Article III provides that the judges of constitutional courts "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." This is a *constitutional* life tenure and a *constitutional* protection against salary diminutions—constitutional provisions which are applicable only to judges of Article III courts. Such provisions "were designed to give judges maximum freedom from possible coercion or influence by the

executive or legislative branches of the Government." *Toth v. Quarles*, 350 U.S. 11, 16.

How, then, are these Article III courts to be identified, these courts that are subject to Congressional directions only within the metes and bounds of Article III? For all practical purposes, they consist of the various United States District Courts, the eleven United States Courts of Appeals and the Supreme Court of the United States—and none other. Those are the only courts that perform all the varied functions prescribed by the Judicial Code and the Criminal Code of the United States, either at the trial or appellate level. Those are the only courts that are completely free to draw upon all relevant legal, statutory and equitable considerations in resolving a case or controversy, including the procedural arsenals of the Federal Rules of Civil and Criminal Procedure. Those are the only tribunals with whom is integrated the jury trial system for the determination of facts, liability or guilt. They alone can act freely "as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property." *Toth v. Quarles*, 350 U.S. 11, 17. And those are the only courts which have been held constitutionally incapable of performing administrative, legislative or executive functions.

At the base of the pyramid of Article III courts are the United States District Courts. At least one has been established within each state and the District of Columbia. 28 U.S.C. §§81-131. And when the term "District Court of the United States" has been used in statutes and rules, it has uniformly been interpreted to have its "historic significance" of describing "the constitutional courts created under Article 3 of the Constitution." *Mockini v. United States*, 303 U.S. 201, 205. As stated in *Longshoremen v. Juneau Spruce Corp.*, 342 U.S. 237, 241, "The words 'district

court of the United States' commonly describe constitutional courts created under Article III of the Constitution, not the legislative courts which have long been the courts of the Territories."<sup>8</sup>

All of the judgments of District Courts, reflecting as they do the exercise of Article III power only, are reviewable on appeal by the Courts of Appeals and by this Court. The constitutional or Article III status of the Courts of Appeals and of this Court is beyond question.

Such, then, is the general outline of the courts established under Article III in order to implement the judicial power of the United States as directed by Congress. The salient features are (1) jurisdiction, as prescribed by Congress, within the limits of the justiciable "Cases" and "Controversies" prescribed in Section 2 of Article III, (2) complete, independent freedom of action in resolving such "Cases" and "Controversies", (3) utilization of all civil and criminal trial procedures, including integrated jury processes, and (4) judges whose tenure and insulation from compensation diminutions stem directly from Article III, Section 1.

### 3.

#### **The Nature of Article I Tribunals.**

Of an entirely different constitutional origin are those tribunals that have been denominated Article I or legislative in nature. The genesis of the distinction between legislative and constitutional courts is to be found in the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511, 546, rendered in 1828. There the status and jurisdiction of courts created by Congress for

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<sup>8</sup> Footnote 4 of the *Longshoremen* opinion, 342 U.S. at 241, made specific note of the creation in the 1948 Judicial Code, 28 U.S.C. §88, of a judicial district for the District of Columbia.

the then Territory of Florida were drawn into question. And there the Chief Justice concluded that such courts, being composed of judges holding office for four year terms,

"... are not constitutional Courts, in which the judicial power conferred by the constitution on the general government, can be deposited. *They are incapable of receiving it.* They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." [Emphasis added.]

The concept of legislative courts was further developed by Justice Van Devanter, writing for a unanimous Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 449:

"While article 3 of the Constitution declares, in §1, that the judicial power of the United States shall be vested in one Supreme Court and in 'such inferior courts as the Congress may from time to time ordain and establish,' and prescribes, in §2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that article 3 does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes

of courts. Those established under the specific power given in §2 of article 3 are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of §2 of article 3; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior."

The constitutional characteristic of a legislative court is that it represents the exercise of some power of Congress other than the invocation of Article III judicial power. In other words, as the *Bakelite* case indicates, Article III does not express the full authority of Congress to create courts or to clothe them with judicial functions. Many of the provisions of Section 8 of Article I, specifying the powers of Congress, create authority for the establishment of special courts to assist solely in the execution of those powers. Other Articles of the Constitution may also give rise to such specialized tribunals.

Among the historical examples of the establishment of these specialized legislative tribunals are the following:

- (1) The Court of Private Land Claims, created in 1891 (26 Stat. 854), by virtue of Congressional power over the fulfillment of stipulations in the Treaty of Guadalupe-Hidalgo and the Gadsden Treaty concluded with Mexico in 1848 and 1853. This court heard and determined land claims against the United States, having taken over that

function from Congress itself. See *Coe v. United States*, 155 U.S. 76; *Ex parte Bakelite Corp.*, 279 U.S. 438, 456.

(2) The Choctaw and Chickasaw Citizenship Court, created in 1902 (32 Stat. 641) to hear and determine controverted claims regarding membership in these two Indian tribes. The establishment of this court reflected the plenary power of Congress over Indian tribes that were under the guardianship of the United States. See *Wallace v. Adams*, 204 U.S. 415; *Ex parte Bakelite Corp.*, *supra*, 457.

(3) Consular courts, described as "legislative courts created as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries." *Ex parte Bakelite Corp.*, *supra*, 451.

(4) United States Court for China, established in 1906 (34 Stat. 814) to exercise over American citizens the extra-territorial jurisdiction earlier conceded by China in a treaty with the United States. It thus represented a means of effectuating Congressional power under the Constitution respecting treaties and commerce with foreign nations.

(5) Territorial courts, deriving from the power of Congress over the territories and possessions of the United States. These are generally denominated legislative courts and the judges thereof serve only for limited terms. See *American Insurance Co. v. Canter*, 1 Pet. 511, 546.

(6) The Court of Claims, established in 1855 (10 Stat. 612) for the investigation and resolution of claims against the United States. Such a function, this Court has declared, "belongs primarily to Congress as an incident of its power to pay the debts of the United States" and is "susceptible of legislative or executive determination." *Ex parte Bake-*

*Bakelite Corp.*, *supra*, 452-3; *Williams v. United States*, 289 U.S. 553, 568-571; *United States v. Sherwood*, 312 U.S. 584, 587.

(7) The Court of Customs and Patent Appeals, established in 1909 (36 Stat. 11, 105) by virtue of Congressional power "to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution, . . . the determination of which [matters] may be, and at times has been, committed exclusively to executive officers." *Ex parte Bakelite Corp.*, *supra*, 458.

(8) The Customs Court, derived from the same power of Congress as was invoked in creating the Court of Customs and Patent Appeals. *Ibid.*

All of these legislative tribunals share certain basic features in common. They uniformly reflect a determination by Congress to execute a particularized function of that legislative body, to create a specialized tribunal "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." *Ex parte Bakelite Corp.*, *supra*, 451. In this sense, these specialized courts represent but one of several choices which Congress has at its disposal in implementing the particular constitutional power. "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Ibid.*, 451.<sup>9</sup>

Thus, as was the case before the establishment of the Court of Claims, Congress can resolve by private legisla-

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<sup>9</sup> "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Crowell v. Benson*, 285 U.S. 22, 51.

tion all claims against the United States. Or, as happened before the creation of the Court of Customs and Patent Appeals, Congress can commit the resolution of disputes in the administration of the customs laws to executive officers. See *Ex parte Bakelite Corp.*, *supra*, 458. Whatever the choice, the power to make that choice "is completely within congressional control." *Ibid.*

To the extent, but only to the extent, that implementation of a particular Congressional power involves determination of "Cases" and "Controversies", Congress may make still another choice—it may invoke Article III judicial power and invest Article III courts with jurisdiction over such matters. As described long ago by this Court in *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. 272, 284, these are matters, "involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

An illustration of this type of choice is to be found in 28 U.S.C. §1346, investing federal district courts with jurisdiction "concurrent with the Court of Claims" over specified claims against the United States. By giving such jurisdiction to the district courts, Congress to that extent has invoked the judicial power of the United States, as defined in Article III, to help resolve these claims. But by placing concurrent jurisdiction in the Court of Claims to decide the identical matters, Congress to that extent refrained from invoking Article III judicial power; instead, it chose to exercise its power "to pay the debts . . . of the United States" through a nonjudicial or legislative court.

That placing such concurrent jurisdiction in the Court of Claims does not make that tribunal an Article III court

or call forth the exercise of Article III judicial power is demonstrated by this Court's decision in *United States v. Sherwood*, 312 U.S. 584. Involved there was this concurrent grant as contained in the predecessor of §1346, then known as 28 U.S.C. §41(20). In acknowledging the concurrence of jurisdiction there given to district courts and to the Court of Claims, this Court was careful to note (p. 587) that the Court of Claims still remained "a legislative, not a constitutional, court" and that its "judicial power is not derived from the Judiciary Article of the Constitution, but from the Congressional power 'to pay the debts . . . of the United States,' which it is free to exercise through judicial as well as nonjudicial agencies."

The critical feature of a legislative court is thus not in terms of whether it may decide questions, concurrently or otherwise, of the same type as those resolved by Article III courts. Obviously, a legislative court like the Court of Claims and the Court of Customs and Patent Appeals does on occasion decide such issues. Otherwise, were such courts not to possess such "judicial" powers, none of their judgments would be reviewable by this Court. See *Pope v. United States*, 323 U.S. 1, 13-14, holding that a judicial determination by a legislative court like the Court of Claims may be subjected to appellate review by this Court even though the nonjudicial functions of such a court are not so subject. In the words of Chief Justice Vinson in his opinion in *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 641:

"The legislative courts created by Congress also can and do decide questions arising under the Constitution and laws of the United States (and, in the case of territorial courts, other types of jurisdiction enumerated in Article III, §2 as well), but that jurisdiction is not, and cannot be, 'a part of that judicial power

which is defined in the 3d article of the Constitution.' These courts are 'incapable of receiving it.' *American Insurance Co. v. Canter*, 1 Pet. 511 at 546; *Reynolds v. United States*, 98 U.S. 145 at 154."

What is decisive as to the identification of a legislative tribunal "lies in the power under which the court was created and in the jurisdiction conferred." *Ex parte Bakelite Corp.*, 279 U.S. 438, 459. Legislative courts, said Chief Justice Marshall, are "created in virtue of the general right of sovereignty which exists in the government." *American Insurance Co. v. Canter*, 1 Pet. 511, 546. In other words, quite apart from Article III and even if that Article were omitted from the Constitution, the sovereign power of the United States would justify the creation of judicial tribunals—known to us as legislative courts—to help execute the powers of Congress or the laws of the United States.

The sovereign power of the United States to do all that is necessary to the effective exercise of the federal government is unquestionably broad. To aid in the enforcement of the tax laws, the public land and Indian laws, claims against the United States, customs laws, patent and trademark laws and the like, Congress has utmost freedom in choosing what it considers to be the most effective and appropriate agencies. It can establish executive departments, administrative agencies or judicial tribunals to effectuate such sovereignty. And when it does establish and create a judicial tribunal for such a purpose, it does so without regard to Article III. And having thus created this type of court, it can impose on the court any kind of jurisdiction it sees fit, both of a judicial and non-judicial nature.

Hence the grant to legislative courts of certain kinds of judicial power which are also exercisable by Article III courts does not necessarily alter the nature of the legisla-

tive tribunals. Such a grant may merely reflect the freedom which Congress possesses with respect to these tribunals, a freedom to confer on them any kind of power (within the bounds of due process) it so desires. See *American Insurance Co. v. Canter*, 1 Pet. 511, 546; *Reynolds v. United States*, 98 U.S. 145, 154; *Clinton v. Englebrecht*, 13 Wall. 434; *Benner v. Porter*, 9 How. 235. And because of that freedom, unlimited as it is by the "case or controversy" concepts of Article III, Congress can give to these legislative courts administrative and executive powers, as well as authority to render advisory opinions—none of which can be given to Article III courts. Constitutionally speaking, Congress can treat a legislative tribunal as it would an administrative agency. Thus it is that Congress has given the Court of Claims jurisdiction "to report to either House of Congress on any bill referred to the court by such House, except a bill for a pension." 28 U.S.C. §1492. And Congress has delegated to the Court of Customs and Patent Appeals the non-Article III function of reviewing patent and trademark decisions of the Patent Office. 28 U.S.C. §1542.

The constitutional freedom of Congress with respect to legislative tribunals further expresses itself in the treatment which can be accorded the judges thereof. Congress can, if it desires, limit the tenure of legislative court judges to a specified number of years; or it may provide life tenure for them. But providing life tenure reflects only a desire of Congress rather than any constitutional mandate and does not alter the legislative status of the judges. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. Moreover, Congress may, as it did in 1932 (47 Stat. 382, 402), reduce the salaries of legislative court judges during their terms of office. *Williams v. United States*, 289 U.S. 553. In dealing with these judges, in other words, Congress is unrestrained by the provision of Article III, Section 1, that judges exercising the judicial power of the United States "shall hold

their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

In a very real sense, therefore, a legislative court judge has no more constitutional status than an administrative or executive officer of the Government. He is subject to the whim of Congress as to tenure and salary and accordingly does not have that constitutional "independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons, and with equal concern for the poor and the rich." *Evans v. Gore*, 253 U.S. 245, 253. He can only perform the limited and specialized functions that Congress has delegated to him. Indeed, like a member of an administrative agency, he is and must be an expert in the specialized field of federal law with which he deals.<sup>10</sup> Such narrow expertise may well be a factor in his selection and appointment to a judicial agency of this nature.<sup>11</sup> The considerations that enter into the selection of a man to exercise the broad powers of an Article III court over the

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<sup>10</sup> Senator Cummins, with reference to the bill establishing the Court of Customs and Patent Appeals in 1909, stated during the Senate debate on the bill: "It is no secret upon the floor of the Senate that the purpose of this court is to secure men who either are at the time of their appointment, or will become, experts—specialists in the construction of this [tariff] law." 44 Cong. Rec. 4185. See also Statement of Board of Appraisers, quoted at 44 Cong. Rec. 4194: "The study, construction, and interpretation of customs laws, principles, and precedents . . . requires the whole time, attention, and study of any lawyer . . . charged with its adjudication."

<sup>11</sup> Senator Bailey, during the debate on the bill establishing the Court of Customs and Patent Appeals, said: "But I do believe that the better qualified a judge is to exercise the general jurisdiction of a federal court, the less qualified he is to administer justice in this particular kind of a case." 44 Cong. Rec. 4198.

life, liberty and property of all those who come before it are not necessarily the same as the considerations pertinent to the selection of a man to do the specialized and technical work of a customs or claims court. Compare *Toth v. Quarles*, 350 U.S. 11, 17.

Restated in practical terminology, a legislative or Article I court of the type epitomized by the Court of Claims and the Court of Customs and Patent Appeals is an agency established to help perform a particular, narrow function of Congress under Article I. It is a tribunal that is not given the wide range of powers and the broad scope of jurisdiction conferred by the Judicial Code and the Criminal Code. It has not been bequeathed broad judicial power over "matters such as were the traditional concern of the courts at Westminster" as manifested on this side of the ocean. *United Steelworkers of America v. United States*, 361 U.S. 39, 60 (concurring opinion of Mr. Justice Frankfurter). Contrariwise, an Article III court is not established simply to hear claims against the United States or to adjudicate appeals from the Patent Office. A constitutional tribunal is designed at birth to exercise, whenever called upon, the full range of the judicial power expressed in Article III, rather than but one or two segments thereof.

Thus, because legislative courts are not established to execute the judicial power of the United States, they are, as Chief Justice Marshall said, "incapable of receiving it." *American Insurance Co. v. Canter*, 1 Pet. 511, 546. They are no more capable of receiving it than is an administrative agency like the Securities and Exchange Commission or the National Labor Relations Board, even though on occasion they adjudicate what is a reviewable case or controversy. Such a legislative tribunal "receives no authority and its judges no rights from the judicial article of the Constitution, but . . . derives its being and its powers and

the judges their rights from the acts of Congress passed in pursuance of other and distinct constitutional provisions." *Williams v. United States*, 289 U.S. 553, 581.

We accordingly arrive back at the nub of the constitutional issue. To allow any tribunal or judge "incapable of receiving" Article III judicial power to exercise the full permissible range of that power is to do violence to the constitutional separation of powers. The judicial power of the United States has been "definitely assigned by the Constitution to one department [and] can neither be surrendered nor delegated by that department, nor vested by statute in another department or agency." *Williams v. United States, supra*, 580. How, then, can Congress purport to authorize the assignment of a retired judge of the legislative department to exercise the powers delegated by the Constitution to the judicial department? That indeed is the question adumbrated in *Ex parte Bakelite Corp.*, 279 U.S. 438, 460.

## 4.

#### **The Article III Nature of the District Court for the District of Columbia.**

Turning to the particular courts involved in the case at hand, application of the foregoing principles makes plain their constitutional status. The decision in *O'Donoghue v. United States*, 239 U.S. 516, in reliance on those principles, establishes that the United States District Court for the District of Columbia—the court before which petitioner was tried and convicted—is a constitutional court of the United States, ordained and established under Article III of the Constitution, that the judges of that court hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office. Upon no basis of reason,

said the Court (pp. 544-45), can it "be said that these courts of the District are *incapable* of receiving the judicial power under Art. 3." The District Court for the District of Columbia is vested generally with the same jurisdiction and powers as possessed by all other federal district courts located in the various states.

In addition, certain administrative or non-judicial functions may and have been given to this District Court since, in dealing with the District of Columbia, "Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state." *Ibid.*, 545. See also *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442-43; *Butterworth v. Hoe*, 112 U.S. 50, 60; *United States v. Duell*, 172 U.S. 576; *Baldwin Co. v. Howard Co.*, 256 U.S. 35. Such powers stem from the express authority given Congress by the Constitution, Article I, Section 8, Clause 17, to "exercise exclusive Legislation in all Cases whatsoever, over such District." The result of recognizing that the courts of the District may validly exercise both judicial and non-judicial functions has led one commentator to label them hybrid courts. See 1 Moore, *Federal Practice*, §0.4[4], p. 72 (2d ed. 1960).

But the "fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question." *O'Donoghue v. United States*, *supra*, 545. The District Court for the District of Columbia was ordained and established under Article III of the Constitution. The judicial power thus conferred, as the *O'Donoghue* case teaches (p. 546),

"... is not and cannot be affected by the additional congressional legislation, enacted under Article I, §8, cl. 17, imposing upon such courts other duties, which,

because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere. The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable."

The court below sought to avoid the constitutional issue posed in this case by relying upon the plenary power of Congress under the District clause, Article I, Section 8, Clause 17. That clause, said the court, is of such broad sweep and of such a plenary nature as to justify the assignment of legislative court judges to exercise "every type of jurisdiction" possessed by the District Court. In so ruling, however, the court below ignored the *O'Donoghue* decision and its demonstration that the District clause of the Constitution is not incompatible with Article III.

However plenary or broad may be the Congressional power over the District of Columbia, such power is necessarily subject to and limited by other provisions of the Constitution. *Capital Traction Co. v. Hof*, 174 U.S. 1, 5; *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435. To quote again from *O'Donoghue*, 289 U.S. at 539, "The power conferred by Art. 1, §8, cl. 17, is plenary; but it does not exclude, in respect of the District, the exercise by Congress of other appropriate powers conferred upon that body by the Constitution, or authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable."

And so in this case, where petitioner is asserting that by virtue of Article III of the Constitution he has the right

to be tried in an Article III court by a judge properly invested with Article III power, it is no answer to say—as the court below said—that Article I, Section 8, Clause 17, authorizes legislation assigning to the District Court for the District of Columbia a judge whose investiture with Article III judicial power need not be determined. In short, the District of Columbia clause of the Constitution is not to be read in a vacuum. If Article III or some provision of the Bill of Rights gives all those accused of federal crimes before the District of Columbia federal court the right to be tried before a judge possessing Article III judicial power, Article I, Sec. 8, Cl. 17, does not carve out an exception thereto.<sup>12</sup> The latter provision is capable of being applied in a manner consistent with Article III and the Bill of Rights. Thus the opinion below only goes to the threshold of the problem and leaves untouched the basic problem as to rights conferred on petitioner and limitations imposed on judicial assignments by Article III.

Indeed, were the decision below to be followed, serious questions would be raised as to the discrimination thereby created against those persons tried before legislative court judges assigned to sit in the District of Columbia courts. That decision assumes, by its silence on the matter, that such an assignment to a federal district court in any of the several states might well be unconstitutional; the situation in the District of Columbia is said to be saved by the plenary scope of Article I, Section 8, Clause 17. Thus the decision below in effect demarcates an exception to Article III, an exception removing the District of Columbia from its impact.

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<sup>12</sup> "Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense." *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1, 9. And see *United States v. Cella*, 37 App. D. C. 433.

But the District of Columbia and its inhabitants are entitled to the protection of all sections of the Constitution not plainly irrelevant. Thus the recognition of the fundamental rights of life, liberty and property in the Constitution "was demanded and secured for the benefit of all the people of the United States, as well as those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property —especially of the privilege of trial by jury in criminal cases." *Callan v. Wilson*, 127 U.S. 540, 550. See also *Capital Traction Co. v. Hof*, 174 U.S. 1; *Page v. Burnstine*, 102 U.S. 664; *Bolling v. Sharpe*, 347 U.S. 497, 499.<sup>13</sup>

Thus to the extent that Article III may be said to ban the assignment of legislative court judges to sit on constitutional courts, that ban must apply equally as to constitutional courts in the various states and in the District of Columbia. Particularly is this true in light of the *O'Donoghue* ruling that Article III and Article I, Section 8, Clause 17, are compatible. The District clause, in other words, justifies no exception from the impact of Article III.

We therefore arrive back at the basic proposition established by *O'Donoghue* that the District Court for the District of Columbia is essentially and primarily an Article III tribunal, a status unaffected by its possession of certain non-judicial functions. Both the court and its judges are

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<sup>13</sup> See Sec. 34 of the Act of Feb. 21, 1871, creating a government for the District of Columbia, which declared: "The Constitution, and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States." 16 Stat. 426.

capable of receiving and do exercise the judicial power of the United States. And to the extent that Article III requires that power to be exercised only by judges capable of receiving and executing Article III power, that requirement applies to the judges purporting to exercise such power in the District Court for the District of Columbia.

The thrust of the foregoing considerations on this case is in no way affected by the fact that the judicial power was here exerted with respect to a criminal violation of the District of Columbia Code. Presumably, jurisdiction over such a violation could have been placed in some lesser tribunal, such as the Municipal Court for the District of Columbia, which lacks many of the indicia of an Article III court.<sup>14</sup> But the possibility that jurisdiction over the trial of such a crime could have been given to a legislative court does not make the trial a legislative proceeding when jurisdiction thereof is conferred upon the District Court.

All that Congress has done here is to invoke the Article III judicial power of the District Court to help execute certain criminal statutes enacted under the District clause of the Constitution, Article I, Section 8, Clause 17. In the same way, Congress has called upon the Article III judicial power of other federal district courts to help execute certain state criminal laws made applicable by the assimilative crimes statute (18 U.S.C. §13) to the other

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<sup>14</sup> Judges of the Municipal Court for the District of Columbia are appointed "for a term of ten years each." 11 D.C. Code §753. Congress has given to this court jurisdiction over most misdemeanor cases and civil actions not in excess of \$3,000. 11 D.C. Code §755(a). It is denominated one of the "inferior courts" of the District, the "superior courts" for the exercise of the "judicial power in the District" being the Municipal Court of Appeals, the United States District Court, the United States Court of Appeals and the Supreme Court of the United States. 11 D.C. Code §101.

federal areas referred to in Article I, Section 8, Clause 17.<sup>15</sup> Likewise, Congress has called upon the Article III judicial power of all federal district courts to aid in the execution of a host of other Article I powers of Congress—ranging from commerce and taxation to patents and bankruptcy.

In all these situations, Congress could have decided to give at least some if not all the judicial powers thus invoked to legislative courts; and some of the powers could have been exercised, at least in the first instance, by administrative tribunals. But the critical fact is that Congress did decide to activate Article III judicial power, which is nonetheless Article III in nature because Congress might have chosen some other technique to help in the execution of Article I authority.

The complete answer to any contention that Congress, in legislating for the District, is reduced to a mere local legislature and that any judicial proceedings emanating from such enactments are necessarily legislative in nature is to be found in *Cohens v. Virginia*, 6 Wheat. 264, 424-9. In holding that a Congressional act authorizing lotteries within the District of Columbia was indeed a law of the United States, this Court, speaking through Chief Justice Marshall, said:

“In the enumeration of the powers of Congress, which is made in the 8th section of the first article, we

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<sup>15</sup> See *Franklin v. United States*, 216 U.S. 559; *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383; *Mannix v. United States*, 140 F.2d 250 (C.A. 4); *United States v. Tucker*, 122 F. 518 (D. Ky.). And see *Cohens v. Virginia*, 6 Wheat. 264, 426-9, discussing the identity of power springing from Article I, Section 8, Clause 17, to legislate both for the District of Columbia and for forts, arsenals, dockyards and other property of the United States. In both instances, said Chief Justice Marshall, Congress enacts laws of the United States, binding the nation and “uniting the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first.” 6 Wheat. at 427.

find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for, it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

"The 2d clause of the 6th article declares, that 'this constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land.'

"The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States. . . .

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" . . . the power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. . . . Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution."

It thus becomes self-evident that Congress can, as a means of securing "complete and effectual execution" of its plenary power over the District of Columbia, call for the exercise of Article III judicial power to aid in enforce-

ing the District criminal code. And to call upon the District Court for the District of Columbia to conduct a criminal trial is necessarily to invoke that court's Article III judicial power. Whether the crime is one outlawed by the District of Columbia Code or by Title 18 of the United States Code, the power to be exercised by the District Court is the power extended to the "trial of criminal cases" (*Toth v. Quarles*, 350 U.S. 11, 15) "arising under . . . the Laws of the United States" (Art. III, Sec. 2).

The power thus kindled brings forth all the procedural and substantive devices created by and for this Article III tribunal to deal with criminal prosecutions, devices which in many ways are unique to Article III courts. In no sense does the court put on a legislative cap to try District Code crimes and a constitutional cap to try Title 18 crimes. Both are treated the same; both evoke the same scope of judicial power.

The non-judicial functions of the District of Columbia courts are not identifiable with criminal trials under the local code. Rather they relate to certain administrative or executive powers, of a type not conferrable on other federal district courts or courts of appeals. Thus, at one time or another, the District of Columbia courts have been given such functions as advising as to the valuation of utility property,<sup>16</sup> reviewing Patent Office decisions,<sup>17</sup> en-

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<sup>16</sup> See *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, holding it to be a legislative function of the District Court to advise, pursuant to what is now 43 D.C. Code §704, the District Public Utilities Commission as to elements of value to be considered in arriving at a true valuation of utility property.

<sup>17</sup> See *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, holding that the decisions of the Court of Appeals for the District of Columbia in patent and trademark appeal cases are not reviewable judgments but merely instructions "by a court which is made part of the machinery of the Patent Office for administrative purposes." The jurisdiction over such appeals has been transferred, however, to the Court of Customs and Patent Appeals. 45 Stat. 1475.

tertaining probate and divorce proceedings,<sup>18</sup> and appointing members of the local school board.<sup>19</sup> None of those matters is within the jurisdiction of any other Article III tribunal. But no decision of this Court or of any other court has ever suggested that a criminal trial, however grounded it may be in the District Code, partakes of any segment of the legislative functions of this District Court.<sup>20</sup>

<sup>18</sup> The District Court has been given jurisdiction over probate and estate matters (11 D.C. Code §§501-504), but other federal courts have "no jurisdiction to probate a will or administer an estate." *Markham v. Allen*, 326 U.S. 490, 494. And until 1956 (see 70 Stat. 112 and 16 D.C. Code §416), the District Court had jurisdiction over divorce and alimony matters, which are outside the powers of other federal district courts. *Barber v. Barber*, 21 How. 582; *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379.

<sup>19</sup> "The members of the Board of Education shall be appointed by the United States District Court judges of the District of Columbia for terms of three years each." 31 D.C. Code §101.

<sup>20</sup> An administrative agency, for example, could not be selected to impose any criminal sanctions established by Congress under the District Code. Nor could an executive officer be selected. Not even Congress itself could reserve the right to determine criminal guilt. As stated in *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86, "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." See also *Tot v. United States*, 319 U.S. 463, 469. Indeed, a federal criminal proceeding is a prime example of the kind of action that requires the exercise of the judicial power defined in Article III and that is invariably exercised by Article III tribunals. See *Williams v. United States*, 289 U.S. 553, 578. The possession of minor criminal jurisdiction by the Municipal Court for the District of Columbia reflects (a) the plenary choice of judicial tribunals which Congress has by virtue of the District clause of the Constitution, and (b) the universally recognized doctrine that petty crimes and misdemeanors may be handled by inferior courts.

## 5.

**The Article I Nature of the Court of Customs and Patent Appeals.**

As indicated, Judge Joseph R. Jackson, who presided over petitioner's trial in the District Court below, was nominated and confirmed as a judge of the Court of Customs and Patent Appeals in 1937 and retired therefrom in 1952. During that period of time there can be no question but that the Court of Customs and Patent Appeals was "a legislative and not a constitutional court." *Ex parte Bakelite Corp.*, 279 U.S. 438, 459. It was a court created by Congress in 1909,<sup>21</sup> as the *Bakelite* opinion, pp. 458-9, pointed out,

"... in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the customs court, formerly called the board of general appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the

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<sup>21</sup> Tariff Act of 1909, 36 Stat. 105. That statute provided that "a United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President, by and with the advice of the Senate, each of whom shall receive a salary of ten thousand dollars per annum. It shall be a court of record, with such jurisdiction as hereinafter established and created." No provision was made as to the tenure of the judges; nor did this statute attempt to designate the court as one created pursuant to Article III.

provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.

"This summary of the court's province as a special tribunal, of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative and not a constitutional court."

The essence of the *Bakelite* decision and its categorization of the Court of Customs and Patent Appeals as a legislative court is the emphasis on the fact that it was established not to exercise the broad judicial powers set forth in Article III but to implement and carry into execution the narrow Congressional power under Article I to lay and collect duties on imports. Such implementation could be, and at earlier times had been, performed by executive officers of the Government. The Congressional choice of a judicial body to perform these chores could not disguise the mark that permeates all such specialized legislative courts—the confinement of jurisdiction to specified matters arising between the Government and others in the administration of a particular power of Congress.

Thus the conclusion was compelled that this court was not created to execute, and does not in fact execute, the gamut of the judicial power of the United States as possessed by the federal district courts and courts of appeals.

The limited nature of its birth and its jurisdiction made impossible any designation of it as an Article III tribunal. The unanimous conclusion thus reached in *Bakelite* was later reaffirmed—again unanimously—in *Williams v. United States*, 289 U.S. 553, 571. There this Court took pains to state that “Further reflection tends only to confirm the views expressed in the *Bakelite Corp.* opinion as to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them.”<sup>22</sup>

Leaving aside for the moment the effect of the 1958 legislation labeling the Court of Customs and Patent Appeals an Article III court, Congress has consistently treated this body as a legislative tribunal. During its birth pangs in 1909, there was no denial of the fact that Congress was thereby creating “not a court, but merely a board.” 44 Cong. Rec. 4191. As one of the opponents of the bill, Senator Cummins, stated, “you are endeavoring to combine a court and an expert; you are endeavoring to combine a board and a judicial tribunal . . . ” 44 Cong. Rec. 4191. And there was no refutation of that point.<sup>23</sup>

Not until 1930, following the *Bakelite* decision, did Congress seek to provide the judges of this “board” with tenure “during good behavior.” Act of June 17, 1930, 46

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<sup>22</sup> In the *Williams* case, the then Solicitor General took the position that the Court of Claims, like the Court of Customs and Patent Appeals, was not an Article III court—a position which the Court sustained. But in 1944 in *Pope v. United States*, 323 U.S. 1, after a restudy of the question, Solicitor General Fahy’s brief argued that the *Williams* case was wrong. The Court in the *Pope* case, 323 U.S. at 13, however, found it unnecessary “to consider what effect the imposition of non-judicial duties on the Court of Claims may have affecting its constitutional status as a court and the permanency of tenure of its judges.”

<sup>23</sup> Another opponent of the creation of the court, Senator Borah, stated: “Now we are told that we should create not a court, but merely a board, because we want an honest and successful administration of the laws which we enact here.” 44 Cong. Rec. 4191.

Stat. 762, 28 U.S.C. §301a (1940 ed.). It then sought to make such tenure retroactive, indicating that prior to the 1930 statute the judges may well have held office only at the will of the President or Congress. To be sure, a legislative court judge may hold office "for such term as Congress prescribes, whether it be a fixed term of years or during good behavior" without affecting his legislative status. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. Thus the 1930 legislation proves nothing except to demonstrate the freedom which Congress has with respect to legislative court judges—a freedom to provide good behavior tenure if it so desires.<sup>24</sup> In contrast, Article III court judges are endowed with good behavior tenure by virtue of the constitutional mandate, which Congress is not free to disregard.

Moreover, when Congress enacted the Legislative Appropriation Act of June 30, 1932, 47 Stat. 382, 402, reducing the salaries of all judges other than Article III judges to \$10,000 per annum, the judges of the Court of Customs and Patent Appeals were quick to comply.<sup>25</sup> And this Court in

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<sup>24</sup> See 71 Cong. Rec. 2043 (May 27, 1929):

MR. CHINDBLOOM. When this court was established it was believed to be a constitutional court that it was not necessary to fix the term. I understand there was a contrary opinion in the other body [Senate].

MR. LAGUARDIA. It was my understanding that it was a legislative body.

MR. CHINDBLOOM. I am referring back to a previous Congress years ago . . .

<sup>25</sup> The judges of the Court of Customs and Patent Appeals voluntarily accepted the reduction in salary from \$12,500 to \$10,000 and waived any constitutional claims they might otherwise have made—futile though such claims might have been by virtue of the *Williams* decision.

On July 11, 1932, the Presiding Judge of the Court of Customs and Patent Appeals addressed the following letter to Attorney General William D. Mitchell:

"I am enclosing herewith a waiver of constitutional rights signed by the judges of our court under the new so-called

*Williams v. United States*, 289 U.S. 553, held that Congress could make such a reduction as to judges of the Court of Claims because they, like judges of the Court of Customs and Patent Appeals, were merely legislative court judges. In contrast, the companion decision in *O'Donoghue v. United States*, 289 U.S. 516, held that such a legislative reduction in salary could not be made as to judges of the District of Columbia courts because of their constitutional status. Hence this 1932 action of Congress in cutting the salaries of judges of the Court of Customs and Patent Appeals is a dramatic illustration of the legislative control over those judges retained by Congress. Had such judges had any semblance of Article III power, the Constitution would have forbidden this salary reduction.

The only major accretion of jurisdiction by the Court of Customs and Patent Appeals since its creation serves further to demonstrate the legislative viewpoint exhibited

economy act, which I wish you would have referred to the proper department. In doing this, I think our judges are moved by the idea that they want to be as helpful as possible in the emergency. The plan, however, of reducing the salaries of the Federal Judiciary during their term of office, whether voluntary or involuntary, is in opposition to the theory upon which the makers of the Constitution acted."

The enclosed waiver, signed by all judges, read as follows:

"TO THE DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

"In conformity with the provisions of section 109 of an act entitled 'An Act making appropriations for the Legislative Branch of the Government for the fiscal year ending June 30, 1933, and for other purposes,' approved June 30, 1932, we, the undersigned presiding judge and associate judges of the United States Court of Customs and Patent Appeals hereby waive any constitutional exemption which we may have from a diminution of salary during our respective terms of office, and respectively remit such part of the compensation as would not be paid to each of us if such diminution of compensation were not prohibited, such waiver to be effective only during the fiscal year ending June 30, 1933.

"July 11, 1932."

by Congress toward this Court. In 1929, legislation was enacted transferring to this court the jurisdiction previously possessed by the Court of Appeals for the District of Columbia to review directly the patent and trademark determinations of the Patent Office. Act of March 2, 1929, 45 Stat. 1475. This transfer was made with full knowledge of the decision of this Court in *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, holding that such patent and trademark jurisdiction in the Court of Appeals was administrative rather than judicial in nature.

In fact, the House of Representatives had passed the identical transfer bill at an earlier session of Congress with the distinct understanding that the constitutionality of the transfer of jurisdiction was assured by virtue of the legislative nature of the Court of Customs and Patent Appeals. See 68 Cong. Rec. 3181-2 (69th Cong., 2d Sess., Feb. 7, 1927). The constitutionality of the transfer statute was said to have been raised by this Court's decision in the *Postum Cereal* case, and in order to "establish the constitutionality of the act" a memorandum was inserted in the Congressional Record. 68 Cong. Rec. 3181-2. That memorandum, which is reproduced in full in the Appendix to this brief, sharply distinguished between Article III and Article I tribunals, and labeled the Court of Customs Appeals (as it was then known) as a tribunal springing from the power of the United States as a sovereign rather than from the power to create inferior courts under Article III. On that basis, said the memorandum, the Court of Customs Appeals could accept jurisdiction over such patent and trademark matters.

Parenthetically, it should be noted that this memorandum was inserted as Appendix H to the Brief on behalf of the United States Court of Customs Appeals, signed by Solicitor General William D. Mitchell, in the *Bakelite* case,

No. 17, Original, October Term 1928, pp. 64-68. That brief referred to the document as "an interesting memorandum dealing with this subject" (p. 36) and merely stated that if, as the memorandum argued, there was an implied sovereign power to organize courts to deal with specialized problems "we do not see why the action of Congress in creating the United States Court of Customs Appeals should be ascribed to it" (p. 37).<sup>26</sup>

And there are indications that the Court of Customs and Patent Appeals itself was wary of accepting jurisdiction over patent and trademark appeals until its legislative nature was definitely established by this Court. As stated by one contemporary commentator:

"At the time of the passage of that act [Act of March 2, 1929, transferring patent and trademark appeals to Court of Customs & Patent Appeals] there was pending in the Supreme Court a case involving the question of whether the Court of Customs Appeals was a so-called Constitutional court or a legislative court. Apparently until this question was settled the Court of Customs and Patent Appeals did not feel justified in hearing any appeals from the Patent Office. The Supreme Court handed down its decision in *ex parte Bakelite Corp.* in May of 1929 indicating that the Court of Customs and Patent Appeals was a legislative court, from which it was to be inferred that the court could properly take jurisdiction of appeals from the Patent Office. Accordingly the Court of Customs and Patent Appeals heard argument in its first

<sup>26</sup> The brief was submitted at the time when the legislation to transfer the patent and trademark jurisdiction to the Court of Customs Appeals was still pending in Congress. The *Bakelite* oral argument occurred on January 2 and 3, 1929. The transfer statute became law on March 2, 1929. The *Bakelite* decision of this Court was rendered on May 20, 1929.

patent cases in June of 1929." Fenning, *Court of Customs and Patent Office Appeals*, 17 A.B.A.J. 323 (1931).

Thus the correctness of this Court's designation of the Court of Customs and Patent Appeals as a legislative court has been fully sustained by the history of Congressional attitudes toward that court prior to 1958. Much of the same considerations put forth last Term by the United States in this case, No. 669, October Term 1960, though not in the same depth, were placed before the Court in the *Bakelite* case. The briefs submitted by both the Bakelite Corporation and the Court of Customs Appeals strenuously urged that the legislation establishing the court, the intention of Congress, the jurisdiction conferred, the "cases" and "controversies" heard by the court, and the legislative history all confirmed the constitutional and Article III status of the court. Yet this Court unanimously rejected that conclusion.

In short, the legislative or Article I nature of the Court of Customs and Patent Appeals is readily apparent from the following comparative considerations:

<i>Characteristics of an Article III court</i>	<i>Characteristics of Court of Cust. &amp; Pat. Apps.</i>
1. Jurisdiction and power arise solely out of Article III cases and controversies. Possesses the full judicial powers traditionally associated with a court in both civil and criminal matters. Jury system an integral part of its procedure.	1. Jurisdiction and power confined to what Congress has given it as a consequence of its exercise of legislative powers over customs and patents. Such jurisdiction and power could as easily be exercised by an administrative board or ex-

*Characteristics of  
an Article III court*

2. All judgments are ultimately reviewable by the Supreme Court.
3. Judges are selected on basis of qualifications to deal with broad range of cases and controversies, both of a criminal and civil nature.
4. Judges hold office during good behavior—i.e., for lifetime unless impeached —by virtue of Article III, Section 1.

*Characteristics of  
Court of Cust. & Pat. Apps.*

ecutive officer. Possesses few of the inherent or broad judicial powers associated with Article III courts. No provision for jury trials.

2. Not all judgments are reviewable by Supreme Court. Patent and trademark judgments are considered to be non-reviewable administrative judgments. *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693; *Pacific Co. v. Skookum Assn.*, 283 U.S. 858; *McBride v. Teeple*, 311 U.S. 649.
3. Judges are selected who are qualified and able to be proficient in knowledge of the technical aspects of the fields of patent and customs law. See 44 Cong. Rec. 4185, 4194, 4198.
4. Judges have held office during good behavior only, since 1930, when what is now 28 U.S.C. §213 was adopted. Prior

*Characteristics of  
an Article III court*

*Characteristics of  
Court of Cust. & Pat. Apps.*

thereto, tenure was not specified or certain. A judge of this court may hold office "for such term as Congress prescribes, whether it be a fixed term of years or during good behavior," without affecting his legislative status. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. See 71 Cong. Rec. 2043.

5. Compensation of judges may not be diminished during continuance in office. Article III, Section 1. See *O'Donoghue v. United States*, 289 U.S. 516.
5. Compensation of judges was in fact diminished in 1932 from \$12,500 to \$10,000. See *Williams v. United States*, 289 U.S. 553.

That the Court of Customs and Patent Appeals may have many of the outward trappings of an Article III court in terms of staff, seals, salaries and the like does not, of course, transform the court into an Article III tribunal. The distinctions between the two types of judicial bodies are grounded in more fundamental considerations than that.

Nor is the status of the court necessarily altered by the fact that the court deals with matters that may be said to arise under the Constitution, law and treaties of the United States, or with controversies to which the United States is a party. Any claim involving the United States,

any proceeding before the N.L.R.B. or the S.E.C., may be said to arise under the laws of the United States or to involve a controversy to which the United States is a party. But at least where the resolution of that controversy may be had pursuant to a special law of Congress in a tribunal that does not and need not have the full powers of a court, Article III power is not thereby invoked and the tribunal is not thereby transformed into one of constitutional status. So it is with the Court of Customs and Patent Appeals. The controversies and matters it resolves may all be dealt with by use of the special, limited powers given it by Congress under special statutes.

At least prior to 1958, therefore, the Court of Customs and Patent Appeals and its judges possessed none of the essential attributes of Article III judicial power. They merely had power in the nature of that given to administrative agencies or executive officers to pass upon a limited type of controversies between the Government and individuals.

## 6.

### **The Effect of the 1958 Congressional Designation of the Court of Customs and Patent Appeals as an Article III Court.**

As indicated, there is not the slightest indication prior to August 25, 1958, that the Court of Customs and Patent Appeals was anything other than a legislative court.<sup>27</sup> Neither the court nor its judges were thought to possess or be capable of receiving Article III judicial power. And it was clearly evident that Judge Jackson was nominated,

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<sup>27</sup> In *Bland v. Commissioner*, 102 F.2d 157 (C.A. 7), *certiorari denied*, 308 U.S. 563, and in *Magruder v. Brown*, 106 F.2d 428 (C.A. 4), *certiorari denied*, 308 U.S. 624, no basis was found for assuming that this Court intended to recede from its pronouncements in the *Bakelite* and *Williams* cases.

confirmed and served as a judge of a purely legislative court during his term ending in 1952.

Then in 1958, some six years after Judge Jackson had retired from the court, Congress enacted an amendment to 28 U.S.C. §211 providing that the Court of Customs and Patent Appeals "is hereby declared to be a court established under Article III of the Constitution of the United States." Act of August 25, 1958, 72 Stat. 848. It thus becomes necessary to inquire into the impact of this legislation on the status of the court and on the capacity of its judges, and Judge Jackson in particular, to receive and exercise Article III judicial power.

By virtue of the 1958 amendment, 28 U.S.C. §211 now reads:

"The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States."

As stated in the authoritative legislative report, S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News, pp. 3309-3310, the primary purpose of this amendment was

" . . . to settle the status of the Court of Customs and Patent Appeals by declaring it to be a constitutional court. The court is now constituted under section 211 of title 28, United States Code, and is classified as a legislative court. Section 1 of the bill would amend section 211 so as specifically to declare the court 'to be a court established under article III of the Constitution of the United States.'

"The cases over which the Court of Customs and Patent Appeals has jurisdiction come within the judicial power of the United States as set forth in article III, which provides that such judicial power shall extend to controversies to which the United States shall be a party. Prior to the creation of the court by the Tariff Act of 1909 the jurisdiction which it now exercises to review decisions of the Customs Court (until 1926 called the Board of General Appraisers) was exercised by the former circuit courts of the United States under section 15 of the Customs Administrative Act of June 10, 1890 (ch. 407, 26 Stat. 138). The old circuit courts were, of course, constitutional courts. And prior to April 1, 1929, the jurisdiction which the court now exercises to review decisions of the Patent Office was exercised by the Court of Appeals for the District of Columbia, a constitutional court. See the act of March 2, 1929 (ch. 488, 45 Stat. 1476). Thus there can be no doubt that the Court of Customs and Patent Appeals should be a constitutional court.

"Similar legislation was enacted by the 83rd Congress establishing the Court of Claims as a constitutional court (act of July 28, 1953, ch. 253, 67 Stat. 226) and by the 84th Congress establishing the Customs Court as a constitutional court (act of July 14, 1956, ch. 589, 70 Stat. 532). There has never been any revisory power in the executive or legislative branches of the Government over the decisions of the Court of Customs and Patent Appeals. On the contrary its decisions are final, subject only to review by the Supreme Court of the United States. The bill will remove all doubt as to the status and source of authority of the court by making it explicitly clear that it is established under and derives its judicial power from article III of the Constitution."

The bill to designate the Court of Customs and Patent Appeals as a constitutional court and to make various other amendments involving the assignment of judges was known as H.R. 7866, 85th Cong. When this bill reached the floor of the House of Representatives for discussion,<sup>28</sup> Representative Celler and Representative Keating both made it plain that the bill "makes no change in the structure, organization, or jurisdiction of the court." 104 Cong. Rec. 16095 (Aug. 4, 1958). Representative Keating added, however, that:

"The Court of Customs and Patent Appeals hears appeals in patent, customs and tariff cases raising questions under the Constitution, the laws of the United States, and treaties made under their authority. Its jurisdiction also extends to controversies to which the United States is a party. This subject matter has always been of the type to which jurisdiction extends by virtue of the Constitution. Under these circumstances, the court itself should be established as a constitutional court under article III."

In sum, the 1958 legislation was the last in a series of three Congressional steps taken to overrule this Court's decisions in the *Bakelite* and *Williams* cases. In 1953 the Court of Claims was declared to be a constitutional court, 67 Stat. 226, 28 U.S.C. §171, contrary to the conclusion reached in the *Williams* case, 289 U.S. at 581, that the Court of Claims "receives no authority and its judges no rights from the judicial article of the Constitution." In 1956 the Court of Customs was declared to be a constitutional court, 70 Stat. 532, 28 U.S.C. §251, contrary to this

<sup>28</sup> The Senate discussion of the bill was unilluminating with respect to the problem here under inquiry. 104 Cong. Rec. 17548-17549 (Aug. 14, 1958).

Court's description of its functions in the *Bakelite* case, 279 U.S. at 457-8, as "all susceptible of performance by executive officers." And the 1958 legislation with reference to the Court of Customs and Patent Appeals was in direct collision with the *Bakelite* determination, 279 U.S. at 458-9, that this court's background and functions "shows very plainly that it is a legislative and not a constitutional court." Essentially the same reasons were advanced by Congress in each of these three instances for declaring the respective courts to be spawned under Article III. In each instance the primary reason was that the given court in fact exercises jurisdiction over matters arising under the Constitution and laws of the United States, and within the judicial power of the United States, and hence should be classified as constitutional.<sup>29</sup>

Of direct pertinence to the instant case is the fact that Congress, in the process of declaring the Court of Claims a constitutional court in 1953, also sought to remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to sit on the Court of Claims. By labeling the tribunal a constitutional court and then expressly providing for such assignments, said the authoritative House Report,<sup>30</sup> Congress would thereby remove all of the "considerable doubt expressed as to the authority of Congress to provide for the assignment of a judge of a constitutional court to sit on the Court of Claims in view of the ruling

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<sup>29</sup> See H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2006, as to the Court of Claims; H. Rep. No. 2348, 84th Cong., 2d Sess. (1956), 2 U.S. Code Cong. and Adm. News (1956), p. 3122, as to the Court of Customs.

<sup>30</sup> H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2009.

that it was a legislative and not a constitutional court.”<sup>31</sup> Such considerable doubt presumably sprang from the observation of this Court in the *Bakelite* case, 279 U.S. at 460, that there might “be constitutional obstacles to assigning judges of constitutional courts to legislative court.”

And by providing subsequently for the interassignment of judges between the district and circuit courts on the one hand and the Court of Customs and the Court of Customs and Patent Appeals on the other, see 28 U.S.C. §§291, 292, 293, following the designation of the latter two courts as constitutional tribunals, Congress seemingly sought to erase any doubts as to the constitutionality of such assignments.<sup>32</sup>

Thus the ultimate constitutional issue as to the assignment of Judge Jackson to the District Court below, as well as the thrust of the 1958 legislation on that issue, becomes clear. This Court, as a matter of constitutional analysis, has established that there are very real distinctions between legislative and constitutional courts. As far back as 1828, when Chief Justice Marshall delivered the *American Insurance Co.* opinion, 1 Pet. 511, those distinctions have been recognized as creating a wall between such courts to the point where legislative courts and their judges are “incapable of receiving” any of the judicial power of the United States flowing from Article III of the Consti-

<sup>31</sup> “Doubt as to the constitutionality of assigning judges from constitutional to legislative courts and vice versa was a reason Congress assigned for classifying the Court of Claims and Customs Court as constitutional courts.” 1 Moore, *Federal Practice*, §0.4[1], p. 60, note 34 (2d ed., 1960).

<sup>32</sup> In *Irish v. United States*, 225 F.2d 3 (C.A. 9), a judge from the then territorial district court of Hawaii, a legislative court, was assigned to sit on the Court of Appeals for the Ninth Circuit, a constitutional court. This assigned judge wrote the opinion for the Court of Appeals. Doubt has been expressed as to the wisdom of such an assignment. See Note, 69 Harv. L. Rev. 760 (1956).

tution. Hence it has been assumed, as the *Bakelite* opinion implied (279 U.S. at 460), that this incapacity constitutionally foreclosed the assignment of legislative court judges to sit on constitutional courts so as to exercise Article III judicial power. Certainly Congress so assumed, and acted on that assumption, in its triadic effort to authorize such assignments.

The 1958 declaration by Congress as to the constitutional status of the Court of Customs and Patent Appeals represents a critical step in any attempt to legitimatize the assignment at issue in this case. Is such a declaration constitutionally effective? And to the extent that it is effective, can it be applied retroactively so as to invest an already retired legislative court judge with Article III powers? Those are among the questions to be answered in this case. And the substantiality and difficulty implicit in those questions are clearly reflected in the action of the Judicial Conference of the United States qualifying its approval of the 1958 legislation by expressing "no view on the question whether the declaration that the United States Court of Customs and Patent Appeals was a court established under Article III of the Constitution of the United States would be constitutionally effective."<sup>33</sup>

At the base of the constitutional distinction between legislative and constitutional courts, to reiterate, is a very simple factor: under what article of the Constitution was Congress acting when it created the particular court and endowed it with specified jurisdiction? If Congress was acting in the execution of one of its specific Article I

<sup>33</sup> See S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3916. The Committee on Revision of the Laws of the Judicial Conference further stated "that it regarded that as a judicial question for determination by the Federal courts if it arose and not within the competence of the Judicial Conference or its committees."

powers, the court is legislative in nature. But if Congress was acting in order to execute the broad judicial power of the United States under Article III, the court is a constitutional tribunal.

That is precisely the demarcation made by this Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 459, when it pointed out that it is a mistake to assume that "whether a court is of one class or the other depends on the intention of Congress," since "the true test lies in the power under which the court was created and in the jurisdiction conferred." Moreover, and in words of highest relevance to this case, the Court further noted that any constitutional obstacles to assigning judges from one type of court to another cannot be avoided "on the theory that Congress intended the court to be in one class when under the Constitution it belongs in another." 279 U.S. at 460.

To put the matter simply, a court assumes a certain status at the time of its legislative birth. In the absence of any change in the nature, functions or jurisdiction of the court, that status can no more be changed merely by a subsequent legislative declaration than can the stripes of a tiger be erased by a joint resolution of Congress. Only if there is some change in the nature or jurisdiction of the court, or some effective form of substantive reorganization of the court, can a court be transposed from a legislative to a constitutional status, or vice versa.

Here the original status of the Court of Customs and Patent Appeals has been authoritatively determined by this Court in the *Bakelite* and *Williams* cases. But in seeking to change that status in 1958, Congress made it quite clear that it was making "no change in the structure, organization, or jurisdiction of the court." 104 Cong. Rec. 16095 (Aug. 4, 1958). Congress effectively eschewed any intention of giving that court any new powers which might

be fairly construed as Article III powers. Thus the 1958 change was merely a semantic one, a change of nomenclature. Needless to say, constitutional distinctions of this far-reaching importance must rest on something more substantial than a word change.

The shallowness of such a change was recognized by the Deputy Attorney General of the United States in 1955 in commenting on the proposal to label the Customs Court a **constitutional court**.<sup>34</sup> The position taken by that bill, he said, "seems to be that the distinction between a legislative and a constitutional court is a matter of language." He then proceeded to call the attention of the Chairman of the House Committee on the Judiciary to this Court's opinion in the *Bakelite* case where the Customs Court had been found to perform only executive functions; and he quoted without comment the portion of that opinion explaining that the status of a court depends not on the intention of Congress but on the power under which the court was created.

The statement of Congress in 1958 that the Customs and Patent Appeals Court was thenceforth to be known as a constitutional court thus comes to no more than an expression of Congressional opinion completely divorced from any change in the nature or functions of that court. It is precisely the kind of expression which the *Bakelite* case held to be wholly irrelevant. And the rationale given for making such a declaration, to the effect that the cases coming before that court do indeed fall within the judicial power of the United States as set forth in Article III, is nothing more than an attempt to second-guess this Court's

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<sup>34</sup> Letter from William P. Rogers, Deputy Attorney General, to Representative Celler, Chairman of the House Committee on the Judiciary, dated July 29, 1955, attached to H. Rep. No. 2348, 84th Cong., 2d Sess. (1956), 2 U.S. Code Cong. and Adm. News (1956), p. 3124.

definitive resolution of that matter in the *Bakelite* and *Williams* cases.<sup>35</sup> Prolonged discussion is unnecessary to demonstrate that this Court, not Congress, is the final authority in determining the applicability of the various articles of the Constitution to courts created by Congress. Cf. *Pennekamp v. Florida*, 328 U.S. 331, 335.

The conclusion is inescapable that the 1958 declaration of Congress, absent any change in the structure, organization or jurisdiction of the court, was totally ineffective to transform the Court of Customs and Patent Appeals into a constitutional or Article III tribunal. And the judges of that court—both the retired and the active judges—were no more capable of receiving or exercising Article III judicial power after that declaration than before it. Hence there is lacking any constitutional sanction for applying the assignment statute, 28 U.S.C §294(d), so as to permit the assignment of a legislative court judge, especially a retired one, to an Article III court in order to exercise the judicial power of the United States in a criminal proceeding.

This conclusion is in no way altered by the fact that the *O'Donoghue* decision determined that the courts of the District of Columbia are of a hybrid nature, exercising both non-Article III and Article III powers. A legislative court judge, incapable of receiving or exercising Article III judi-

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<sup>35</sup> In reporting the bill to fasten the constitutional court label on the Court of Claims, the House Committee on the Judiciary stated *inter alia*: "It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under article III. (See Congressional Globe, 33d Cong., 2d sess., pp. 71, 72, 105-106, 110, 111, 113, and 114.) . . ." H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2007. Such a statement, made 99 years after the establishment of the court, cannot serve to change the legislative purpose or power in establishing the court, as determined in the *Williams* case. See *United States v. United Mine Workers*, 330 U.S. 258, 282.

cial power, is no more capable of exercising such power in a hybrid court to which he may be assigned than he is in a court organized exclusively under Article III. He is just as unable to execute the judicial power of the United States in a court of the District of Columbia as is a member of the National Labor Relations Board were Congress suddenly to denominate the Board an Article III court and give the members life tenure.

## 7.

### The Post-1958 Status of Judge Jackson.

In order to sustain the constitutionality of the 1960 assignment of Judge Jackson to the District Court below, it must be established just where and when he became capable of receiving and exercising Article III judicial power. That determination, of course, involves no question as to his judicial fitness or integrity or ability. There are doubtless many excellent attorneys in Congress professionally and temperamentally capable of executing the judicial power of the United States. But because of the fundamental doctrine of separation of governmental powers, they are not considered constitutionally capable of receiving or exercising the authority of the judicial branch. And so it is with Judge Jackson. Unless at some point it can fairly be said that he acquired the authority to exercise Article III power, he is as incapable of exercising it as the most able lawyer serving in the Senate.

The most striking fact about Judge Jackson's career is that the court to which he was appointed in 1937 and on which he served for nearly fifteen years was, as we have seen, considered during all of that period to be legislative in nature and incapable of receiving Article III power. The extent of his powers and functions can certainly rise

no higher than those possessed by the court to which he was appointed. In short, if a court is legislative in nature, so too are its judges.

Here Judge Jackson was never nominated by the President or confirmed by the Senate in the light of any established notion that he could constitutionally exercise Article III judicial powers. True, as the court below noted (R. 40-41), at the time of Judge Jackson's appointment to the Court of Customs and Patent Appeals in 1937, there was in force a statute providing for the assignment of judges of that court to the District Court (then known as the Supreme Court) for the District of Columbia. 28 U.S.C. §22 (1934 ed.). That statute had been enacted in 1922, prior to the rendition of the *Bakelite* decision. But by the time of the appointment of Judge Jackson in 1937, the *Bakelite* decision had given fair warning, 279 U.S. at 460, that there might well be constitutional objections to such an assignment. The most that can be said, therefore, is that the appointment was made with knowledge that Judge Jackson's possible assignment to the District Court under this statute was of questionable constitutionality.

Much more obvious is the fact that this appointment was made primarily if not exclusively on the theory that Judge Jackson would exercise the legislative powers of the Court of Customs and Patent Appeals. And during his tenure on that court he was not in fact ever assigned to the District Court. In light of the *Bakelite* opinion, in full effect during his entire tenure on the Court of Customs and Patent Appeals, any assumption that Judge Jackson somehow acquired Article III judicial powers in this period is completely misplaced.

The focal point of inquiry must accordingly shift from the period of Judge Jackson's active service on the Court of Customs and Patent Appeals to that following his re-

tirement in 1952. The problem here is highlighted by the absence of any authority for the proposition that a judge who has retired from a legislative court can somehow acquire Article III powers during the period of his retirement. It is true that a retired constitutional court judge is considered as continuing in office within the meaning of Article III, Section 1, of the Constitution so as to forbid any diminution of his retirement compensation. *Booth v. United States*, 291 U.S. 339. But that ruling only suggests that a retired legislative court judge continues to hold a legislative office after his retirement.

It has been said that however legislative in nature may have been Judge Jackson's status prior to 1958, the enactment of the amendment to 28 U.S.C. §211 in 1958 certainly gave him Article III status thereafter. The short answer is that the 1958 legislation is only prospective in nature. It does not purport to be retroactive in scope or to affect the constitutional status of any judge who had previously retired from the court.<sup>36</sup> The amendment was expressly premised on the fact, stemming from the *Bakelite* decision, that the court "is now constituted under section 211 of title 28, United States Code, and is classified as a legislative court." S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3909. The amendment was accordingly drafted in the present tense with an eye to the future. In the amendment's terminology,

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<sup>36</sup> Compare the overt attempt to give retroactive effect to the 1930 legislation conferring good behavior tenure on judges of the Court of Customs and Patent Appeals: "For the purposes of section 260 of the Judicial Code, as amended, (relating to the resignation and retirement of judges of courts of the United States) any service heretofore rendered by any present or former judge of such court, including service rendered prior to March 2, 1929, shall be considered as having been rendered under an appointment to hold office during good behavior." Sec. 646 of Tariff Act of June 17, 1930, c. 497, 46 Stat. 762.

"Such court is hereby declared to be a court established under Article III of the Constitution of the United States." No effort was made to rewrite the status of the court prior to 1958 or to say that the court from the time of its conception in 1909 was declared to be an Article III court.

In view of that background, the 1958 amendatory legislation can fairly have no impact whatever on the capacity of Judge Jackson to perform Article III functions. The prospective intent and language of the 1958 declaration confine its thrust, if any, to those judges then sitting on the Court of Customs and Patent Appeals or becoming members thereafter. Judge Jackson took with him into retirement in 1952 only those legislative powers he acquired on appointment, and the effort to add to his powers in 1958 came too late.

On the other hand, even if the 1958 amendment be viewed as a *nunc pro tunc* declaration of Article III status, the way is still not clear to investing Judge Jackson with Article III power. The uncontested fact is that the 1958 amendment was a mere characterization of the Court's status and was not intended to change the nature or functions of the court. Yet under the ruling of the *Bakelite* case, 279 U.S. at 459, a mere legislative characterization or declaration of a tribunal's constitutional status is not controlling.

Moreover, if the 1958 legislation were somehow construed to have reconstituted the Court of Customs and Patent Appeals and to have altered its constitutional status, renomination and reconfirmation of that court's judges would be necessary before any of them could exercise their new Article III powers.<sup>37</sup> Just how a retired legislative court

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<sup>37</sup>. The need for reappointing judges of a legislative court if and when the fundamental character of such a court were changed was recognized in the following colloquy on the floor of the Senate during the consideration of the bill to declare the Court of Claims

judge could be renominated and reconfirmed as a retired Article III court judge is not clear. But the need for some form of reappointment is obvious. The considerations which give rise to the nomination and confirmation of a man to perform the essentially executive functions of a legislative court are not necessarily the same as those involved where the appointee must be equipped to wield the Article III judicial powers. A man may be thought qualified to resolve difficult tariff or customs problems but not of the right background, training or temperament to deal with the problems of life, liberty and property in an Article III court. And if all active and retired legislative court judges are suddenly to be qualified to dispense Article III justice the President and the Senate should have some opportunity to re-evaluate such court personnel in that light. Otherwise the appointive powers of the President and the confirmation duties of the Senate are abdicated to the Chief Justice of the United States in the exercise of his assignment powers.

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a constitutional court (no change being made in the structure or functions of that court), 99 Cong. Rec. 8944, July 10, 1953:

Mr. GORE: I think it resolves itself into a question of whether we do or do not reconstitute the court. If we change the fundamental character of the court, then reappointment or appointment, as the case might be, would become absolutely necessary, and the appointments would require confirmation.

Mr. McCARRAN: Again the Senator and I are in agreement on that, as a moot question, because we have agreed on the House bill.

Mr. GORE: We shall get together on that later.

## 8.

**Problems Raised by Giving Effect to 1958 Legislation.**

Finally, any conclusion that the Court of Customs and Patent Appeals is, by virtue of the 1958 amendment, a constitutional court and that its active and retired judges may be assigned to sit on Article III courts is to open a Pandora's box of confusion and inconsistencies. It still remains true, for example, that this Court will not and cannot review any lower court determination other than that of a judicial nature. And the Court of Claims—despite its denomination by Congress as an Article III court—still retains statutory jurisdiction to render advisory opinions on bills for monetary relief of claimants referred by either house of Congress. 28 U.S.C. §§1492, 2509. At the same time, however, the constitutional concepts of "cases" and "controversies", over which the federal judicial power extends, have been held to deny Article III courts the power to give advisory opinions. See, e.g., *Muskrat v. United States*, 219 U.S. 346.

How, then, can the new "constitutional" or Article III status of the Court of Claims be squared with its continuing power to render advisory opinions to Congress? Is not the 1953 declaration as to the Court of Claims inoperable on this basis alone? Or are the concepts of "cases" and "controversies" to be scrapped and recognition given to the fact that Article III courts can be delegated to perform non-judicial functions?<sup>38</sup>

The problem and perhaps the simple answer are to be found in the discussion of Senator Gore during the debate on the 1953 declaration as to the Court of Claims (99 Cong. Rec. 8943-8944, July 10, 1953):

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<sup>38</sup> See Note, The Constitutional Status of the Court of Claims, 68 Harv. L. Rev. 527, 531-535 (1955).

"I refer to the basic question of whether Congress can, under the Constitution, designate the Court of Claims an article III court and still require it to exercise the special type of jurisdiction which it has conferred upon it.

"Over the years the Supreme Court has consistently followed the principle that the Federal courts, other than those for the District of Columbia, created under article III of the Constitution, can exercise only jurisdiction falling within the judicial limits set forth in article III. . . . Thus a cloud is cast upon the constitutionality of having the Court of Claims, as an article III court, exercise the principal jurisdiction which Congress has conferred upon it. . . .

"Section 2509 of title 28 of the United States Code directs the Court of Claims to render advisory opinions on cases referred to the court by the Congress. This would seem to be a function which Congress could not require of a constitutional court. No one would seriously contend that it is a judicial power in the sense of article III.

"Since the present judges of the Court of Claims have indicated that they would raise no objection to continuing to act on congressional reference cases, perhaps the problem is moot, at least temporarily. If in the future judges of the Court of Claims should refuse to act upon congressional reference cases on the grounds that they are not within the proper scope of jurisdiction of a constitutional court, *I suppose the simple remedy will be for Congress to redesignate the Court of Claims as a legislative court.*" (Emphasis added.)

The "simple remedy" thus provided by Senator Gore is most revealing as a statement of the belief that Congress

can turn the Article III status of such a court as the Court of Claims on and off like a faucet. And it epitomizes the constant threat that hangs over such a court, the threat that some day Congress may change its intention and relabel it a legislative court, with all the salary and tenure implications that such a relabeling would entail. Such is the ephemeral quality of the Congressional relabeling process.

Still another problem raised by any recognition of the effectiveness of a legislative declaration of an Article III status is one directly involving the Court of Customs and Patent Appeals. Ever since the decision in *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, this Court has recognized that the decisions of that court in patent and trademark application matters are not reviewable judicial judgments but merely instructions "by a court which is made part of the machinery of the Patent Office for administrative purposes."<sup>39</sup> See also *Pacific Northwest Canning Co. v. Skookum Packers' Assn.*, 283 U.S. 858; *McBride v. Teeple*, 311 U.S. 649.

But if the Court of Customs and Patent Appeals actually did acquire Article III status in 1958, its jurisdiction to consider such patent and trademark matters and to render administrative judgments thereon would be in constitutional jeopardy. Yet that court continues to resolve such non-judicial matters. And the United States, consistent with its position in the pre-1958 legislative court days, continues to oppose the grant of certiorari to review such post-1958 decisions on the ground that they are still non-judicial decisions outside the appellate jurisdiction of this

<sup>39</sup> While the *Postum* case involved such an administrative determination by the Court of Appeals for the District of Columbia, that court's jurisdiction over such matters was transferred in 1929 to the Court of Customs and Patent Appeals, 45 Stat. 1475, and the decision in *Postum* is fully applicable to the decisions of the latter court.

Court. See *Rubenfield v. Watson*, 362 U.S. 903; *Commissariat a L'Energie Atomique v. Watson*, 362 U.S. 977. And this Court has denied certiorari in those post-1958 cases, though without specifying the reasons.

Perhaps the "simple remedy" here is the one previously given by Senator Gore as to the Court of Claims—if Congress really wants the Court of Customs and Patent Appeals to continue dealing with patent and trademark cases it should relabel the court a legislative tribunal. Here, then, is the threat that must constantly hang over the judges of the Court of Customs and Patent Appeals, the threat of another relabeling statute and the possibility that Congress may once again act—as it did in 1932—to cut their salaries, or to change their tenure.

These problems, if they be such, are merely indicative of the inescapable fact that the courts which were found to be legislative in nature in the *Bakelite* and *Williams* cases continue to function and operate in the same non-Article III manner as was described in those opinions. Their legislative nature continues to the present day within their original jurisdictional bounds. Nothing has changed. Like the stripes on the tiger, the non-Article III characteristics remain evident despite the Congressional name-changing action.

Enough has been said to indicate the dangers of such a facile legislative labeling process in dealing with the serious constitutional distinctions between legislative and Article III courts. Those are distinctions which only this Court can ultimately determine and resolve. And its decisions should remain final by virtue of its supreme power to interpret and apply the Constitution.

No reason is apparent why this Court's decisions in *Bakelite* and *Williams* should not be respected as to the

still unchanged status of the Court of Customs and Patent Appeals.

## 9.

### **Miscellaneous Considerations.**

— (A) *Petitioner's standing to raise the constitutional issue.* No real question exists as to the standing of the petitioner, as a person convicted of a felony in a trial presided over by Judge Jackson, to raise the issue as to the judge's constitutional capacity to sit and to render judgment against him. As an inhabitant of the District of Columbia under criminal indictment, he was entitled to be tried, in accordance with the Congressional scheme, before a court and a judge fully vested with the judicial power conferred by Article III of the Constitution. *O'Donoghue v. United States*, 289 U.S. 516, 540; *Callan v. Wilson*, 127 U.S. 540, 550. And if the judge did indeed lack warrant to sit, the trial was without due process of law. See *Donegan v. Dyson*, 269 U.S. 49, 54-5.

(B) *Petitioner's right to raise such a constitutional and jurisdictional issue on appeal.* Nor can there be any serious question of petitioner's right, at this appellate stage, to question Judge Jackson's constitutional authority, the issue not having been raised at the trial court level. The conclusive fact is that this issue is not only constitutional but jurisdictional and hence is open to question and to adjudication at any time, even by this Court *sua sponte*.<sup>40</sup> As Mr. Justice Frankfurter noted in his opinion last term in the instant case, 366 U.S. at 713, petitioner here "raises a jurisdictional question, *viz.*, whether he could constitu-

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<sup>40</sup> The right to raise jurisdictional issues on appeal for the first time is too well settled to require extensive citation of authority. See e.g., *McGrath v. Kristensen*, 340 U.S. 162, 167; *Gainesville v. Brown-Crummer Inv. Co.*, 277 U.S. 54, 59.

tionally be tried by a court presided over by a retired judge of the Court of Customs and Patent Appeals." In other words, petitioner here is relying upon the fact that Congress has called upon the District Court to exercise its Article III power to deal with this prosecution. In this situation, the words of this Court in *Williams v. United States*, 289 U.S. 553, 578, become pertinent:

"... where a controversy is of such a character as to require the exercise of the judicial power *defined by Art. 3*, jurisdiction thereof can be conferred only on courts established in virtue of that article, and that Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since, to repeat the language of Chief Justice Marshall in *American Ins. Co. v. Canter*, 1 Pet. 511, 'they are incapable of receiving it.'"

(C) *The inapplicability of the de facto doctrine.* As developed more fully in petitioner's reply brief in the Supreme Court last term (pp. 10-16), the *de facto* doctrine constitutes no defense to the challenge to Judge Jackson's capacity to sit in this case. The issue is solely one of his *constitutional authority* to act and to preside over a criminal proceeding of an Article III nature. And where there is this type of allegation, that a constitutional or statutory provision makes a judge incompetent to sit, the courts have uniformly rejected the *de facto* doctrine. See *American Construction Co. v. Jacksonville Railway*, 148 U.S. 372, 387; *Frad v. Kelly*, 302 U.S. 312, 316; *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 691; *Watson v. Payne*, 94 Vt. 299, 301; *Norton v. Shelby County*, 118 U.S. 425, 441.

(D) *The impact on past decisions.* The fear has been expressed by some that, if the 1960 assignment of Judge Jackson to sit on the District Court below is found to lack constitutional sanction, a veritable crisis might occur in the administration of justice. That crisis is said to arise out of the multitude of judgments, both civil and criminal, rendered by Judge Jackson in the course of almost continual assignments to the District Court for the past few years. If all those judgments are to be considered void, a most difficult situation is said to present itself.

But a valid constitutional claim is not to be denied simply because drastic consequences may ensue. Cf. *Brown v. Board of Education*, 347 U.S. 483. More importantly, however, this Court is not without judicial resources to accommodate constitutional doctrines with the practical administration of justice. The scope and limits of any constitutional doctrine defined by this Court are matters to be determined with discretion and in light of all relevant factors. Adjudication, Mr. Justice Frankfurter has said, "is not a mechanical exercise nor does it compel 'either/or' determinations." *Griffin v. Illinois*, 351 U.S. 12, 26 (concurring opinion).

This is not the occasion to define the retroactive scope of a decision invalidating Judge Jackson's assignment. It is enough that the constitutional, jurisdictional issue has been raised in a direct appeal from petitioner's conviction so as to call forth an adjudication as to the substance of that issue. Whether such a claim, involving as it does the capacity of an individual judge rather than the power of the court to which he is assigned, may be recognized in a collateral proceeding need not here be determined. See *Donegan v. Dyson*, 269 U.S. 49, 54-5.<sup>41</sup> Nor is deci-

<sup>41</sup> In the *Donegan* case, the petitioner had been convicted in the federal district court in Florida, presided over by Circuit Judge Julian W. Mack. Judge Mack had been assigned to service on that

sion here necessary as to whether the principles of res judicata should be applied to such an issue which might have been but was not raised in the original proceedings. Cf. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403.

Enough has been said, however, to justify the invalidation of the assignment as respects petitioner's trial. That alone is all that is involved at this time. Congress has exceeded the constitutional limitations in authorizing this assignment and "this Court should not good-naturedly ignore such a transgression of congressional powers." Opinion of Mr. Justice Frankfurter in *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 655. Petitioner's trial in such circumstances constituted a denial of due process of law.

court by a designation signed by Chief Justice Taft. Following affirmation of his conviction, petitioner filed a habeas corpus petition, alleging that Judge Mack had no power or jurisdiction to act as a district judge since the Commerce Court to which he had been appointed had been abolished. Chief Justice Taft, who had made the assignment, wrote the opinion for this Court rejecting that contention on its merits. The opinion expressly stated (pp. 54-5) :

"We thus do not think it necessary to consider whether even if the designation had not been valid, the sitting judge should be regarded as a judge *de facto* whose authority could not be questioned in a collateral attack, like proceeding in habeas corpus.

"No question has been made whether the appeal really involves the construction or application of the Federal Constitution, such that if the construction contended for were correct and the judge were sitting without warrant, the trial would be without due process of law. We have assumed that for purposes of the decision and also that the question could be raised on habeas corpus."

### Conclusion

For the foregoing reasons, the judgment below should be reversed and the case remanded for a new trial before a judge capable of receiving and exercising Article III judicial power.

Respectfully submitted,

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December, 1961.

## APPENDIX

### Excerpt From 68 Cong. Rec. 3181-2 (Feb. 7, 1927), 69th Cong., 2d Sess.:

Mr. GRAHAM. Mr. Speaker, I ask unanimous consent to insert in the RECORD a comment upon the question of the constitutionality of this transfer. That question has been raised under a decision of the Supreme Court January 3, 1927, and these remarks would clearly, I think, establish the constitutionality of the act.

The SPEAKER. The gentleman from Pennsylvania asks unanimous consent to extend his remarks in the RECORD by publishing a statement upon the constitutionality of the act. Is there objection?

Mr. LAGUARDIA. May we have the remarks placed in the RECORD at this point?

The SPEAKER. The gentleman from New York asks unanimous consent that the remarks be placed in the RECORD at this point. Is there objection?

There was no objection.

The statement is as follows:

Congress exercises the function of creating courts under several different grants of power. It is expressly given the power of creating inferior courts to the Supreme Court of the United States in the administration of Federal justice under the grant of Article III of the Constitution. These courts exercise jurisdiction within the borders of each State in all cases described in the third article as judicial power extended by that article to the United States. Congress may create courts to exercise complete jurisdiction over the District of Columbia, as given it by reason of the exclusive governmental jurisdiction that it has over the District vested expressly by the Constitution. Congress may in the same way create courts to exercise complete and exclusive judicial jurisdiction over the Territories of the United States under that provision of the Constitution which gives Congress the right to impose needful regulations over the territory and property of the United States. This latter power is also said by Chief Justice Marshall and others to grow out of the power of the United States

as a sovereign to govern the territory which it owns, not in the States. In the same way it may be properly said that were there no third article to the Constitution, the United States as a sovereign Government could create courts to decide cases arising between the Government and such individuals in reference to its own taxes, its own grants, and in reference to its own debts. In other words, I conceive that without the special grant of power under the third article of the Constitution Congress could exercise the power of a sovereign, create a court of claims to pass on the debts which the United States may owe to individuals, on grants of lands which it may have granted to individuals, to grants of patent rights which it may have granted to individuals, and the construction and decision of cases arising under the customs or internal revenue laws affecting the payment of the revenue which a sovereign must collect in order that it may live. With reference to these latter courts, it may be said that the same rigid rule would not be applied to the functions which Congress may give to them as to whether they shall be purely judicial or not, as has been applied in respect to courts that exercise a Federal jurisdiction under the third article of the judicial power of the United States, as distinguished from the general administration of justice by the States within State borders, which could not exist but for the third article. In this way the Court of Claims, the Court of Customs Appeals, and a court of patents may be easily distinguished from the Supreme Court and its subordinate courts under the third article in respect to limitation to strictly judicial functions.

The Supreme Court and the subordinate courts of the United States, exercising jurisdiction within the several States of the Union, all deal with cases and controversies in the sense of the third article of the Constitution, but as to courts which are not concerned with the exercise of judicial power within or affecting the several States, there is reason to believe that they stand on a different plane, and that as they are brought into being and exist in virtue of the sovereignty of the United States, and of its power to do all that is essential to the effective exercise of a government, such as aiding in the enforcement of the taxation

laws, aiding in the administration and enforcement of the public land laws and the Indian laws, and in the ascertainment and determination of claims against the United States and the administration of the laws relating to the granting of patents, copyrights, and trade-marks, they may be invested with jurisdiction and powers which lie outside of and beyond the controversies and cases which are comprehended by the third article of the Constitution. Illustrations of this will be found in the court of private-land claims, which for many years ascertained and reported the facts respecting conflicting claims to lands, jurisdiction over which was ceded to the United States by Mexico, to the special Indian court, which dealt with claims to citizenship of the Five Civilized Tribes in the Indian Territory when Congress was preparing that region for admission to the Union as a State, to the Court of Claims, and especially its power and authority to examine and report on claims, at the instance of either House of Congress or at the instance of any of the executive departments of the Government. In *Gordon v. United States* (117 U.S., Appendix 697, 699), Chief Justice Taney said:

"So far as the Court of Claims is concerned, we see no objection to the provisions of this law. Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress or a head of any of the executive departments."

And while in that and other cases it is held that where the action of such a tribunal is intended to be advisory only, and in aid of legislative or administrative action, there can be no review by the Supreme Court, the cases all recognize that Congress, consistently with the Constitution, may establish special tribunals and clothe them with power to ascertain and decide facts and report them as a basis for legislative or administrative action, without putting them in the form of a controlling judicial judgment.

The case of the *Postum Cereal Co. v. California Fig-Nuts Co.*, decided January 3, 1927, following the case of *Keller v. The Potomac Electric Power Co.* (261 U.S. 428),

which in turn followed the case of Baldwin v. Howard (256 U.S. 35), and Muskrat v. United States (219 U.S. 346), were cases in which the jurisdiction of the Supreme Court of the United States was in question, and it was held that its power and jurisdiction as a court was limited to judicial cases and controversies and could not extend to mere decisions as by a commission or special tribunal created for the purpose of aiding governmental functions, whether legislative or administrative. But these cases would not apply to a Court of Customs and Patent Appeals, to whose jurisdiction Congress may properly add the duties of an administrative tribunal for governmental purposes.

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No. 481

In the Supreme Court of the United States

OCTOBER TERM, 1961

BENNY LURE, PETITIONER

v.

UNITED STATES OF AMERICA

BY WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1961

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No. 481

BENNY LURK, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The *per curiam* opinion of the court of appeals, *sit-in banc* (R. 38-41), and the concurring opinion of Judge Prettyman (R. 43-49), have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1961 (R. 42). The petition for a writ of certiorari was filed on July 21, 1961, and was granted on October 9, 1961 (R. 50; 368 U.S. 815). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner has standing to challenge, for the first time on appeal, the authority of Judge

Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals, who pursuant to designation and assignment presided over petitioner's trial in the District Court for the District of Columbia.

2. Whether, assuming the Court of Customs and Patent Appeals to be a "legislative" court, its judges (including retired judges) can be constitutionally authorized by Congress to serve on the District Court for the District of Columbia.

3. Whether the Court of Customs and Patent Appeals is and has been a court created under Article III of the Constitution.

#### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

The pertinent provisions of Article I, Section 8 and of Article III of the Constitution; of 28 U.S.C. 211 (establishing the Court of Customs and Patent Appeals); of 28 U.S.C. 293(a) (authorizing the assignment of Court of Customs and Patent Appeals judges to serve on other courts); of 28 U.S.C. 294 (authorizing the assignment of retired judges to active duty); of the Act of August 25, 1958, § 1, 72 Stat. 848 (amending 28 U.S.C. 211 so as to declare the Court of Customs and Patent Appeals to be a court established under Article III of the Constitution); of the Payne-Aldrich Tariff Act of August 5, 1909 (under which the Court of Customs Appeals, now the Court of Customs and Patent Appeals, was originally created); and of Sections 1601-1608 of Title 16 of the District of Columbia Code (providing for *quo warranto* procedures for challenging the rights of office-

holders to their offices) are set forth in Appendix A, *infra*, pp. 118-130.

#### STATEMENT

On May 29, 1961, this Court reversed the judgment of the Court of Appeals for the District of Columbia Circuit denying petitioner further leave to appeal *in forma pauperis* from his conviction in the District Court for the District of Columbia for robbery (in violation of 22 D.C. Code 2901) and remanded the case to the court of appeals for further proceedings (R. 36; *Lurk v. United States*, 366 U.S. 712). On June 7, 1961, the court of appeals, *sua sponte*, ordered that the case be set for argument before the court *en banc* on June 20, 1961, on the basis of the briefs and record filed in this Court and with leave to the parties to file supplemental briefs (R. 37). On June 22, 1961, the court issued its unanimous *per curiam* opinion affirming the conviction (R. 38-41).<sup>1</sup>

Petitioner's claim that evidence was erroneously admitted at his trial was held to be without substance (R. 39-40), and petitioner does not renew the claim here (Br. 8, note 4).

With respect to the second issue which petitioner had raised—the constitutionality of the assignment of Judge Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals, for service on the District Court for the District of Columbia during 1960—the court below, “[d]eeming it [its] duty to dispose of the case with as complete an avoidance as may be of constitutional questions, see *Harmon v. Brucker*, 355 U.S. 579 at 581 (1958),” held that Judge

<sup>1</sup>Judge Fahy did not participate.

Jackson was qualified to sit "on the following ground: that the assignment must in any event be sustained under the plenary power of Congress over the District of Columbia and its courts, pursuant to Article I, Sec. 8, Cl. 17, of the Constitution" (R. 40).

Pointing out that at the time of Judge Jackson's appointment to the Court of Customs and Patent Appeals in 1937 there was in force a statute—enacted in 1922 (see *infra*, p. 76)—making the judges of that court eligible, on designation by the Chief Justice of the United States, for service on the Court of Appeals and Supreme Court (now District Court) of the District of Columbia, the court noted that the post to which Judge Jackson was appointed by the President and confirmed by the Senate was one which "clearly included the possibility and prospect of judicial service on the Supreme Court of the District of Columbia, now the United States District Court for the District of Columbia" (R. 41). While noting that the 1922 statute "is now not limited to the District of Columbia but includes assignments to judicial service throughout the country",<sup>2</sup> the court concluded (R. 41):

Be that as it may, we think that at all relevant times Congress has specifically made available the services of the judges of the Court of Customs and Patent Appeals to meet the needs of the United States District Court for the

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<sup>2</sup> The broadening of the 1922 legislation to include service on any court of appeals or district court throughout the country occurred in 1958 (see *infra*, pp. 76-77).

District of Columbia. We think there can be no doubt of the power of Congress to do so, in view of the broad sweep of its legislative authority over the Federal District. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838); *O'Donoghue v. United States*, 289 U.S. 516, 545 (1933); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 443 (1923).

On July 17, 1961, Judge Prettyman filed a separate statement, concurring in the *per curiam* opinion (R. 43-49). He traced the legislative history of the 1922 statute, reviewed past assignments of judges of the Court of Customs and Patent Appeals to the local courts pursuant to the statute, and observed that the designation of Judge Jackson was "nothing new", but part of a practice of "almost forty years" (R. 45).

#### SUMMARY OF ARGUMENT

##### I

The office which Judge Jackson held during the petitioner's trial—the office of District Judge of the District Court for the District of Columbia—is admittedly a lawful or *de jure* one. The designation of the judge by the Chief Justice of the United States to sit on the District Court was made under and in accordance with 28 U.S.C. 294. Pursuant to that designation, Judge Jackson, in good faith, filled the office of district judge and exercised the normal judicial functions incident thereto. Under these circumstances, he was, at the least, a *de facto* judge whose title to office and whose exercise of authority were not

subject to challenge by petitioner as a defendant in a criminal trial—in any case not for the first time on appeal.

A. The rule is settled in the federal courts that where a judge, in good faith and under color of authority, is in actual possession and discharging the duties of a *de jure* office, a party litigant has no standing (at least on appeal) to challenge the title of the judge to hold the office or his exercise of judicial authority, whether he is regularly or temporarily filling the office. *Ex parte Ward*, 173 U.S. 452; *McDowell v. United States*, 159 U.S. 596. This doctrine is grounded upon principles of public policy to avoid the confusion, uncertainty, and delay which would result from challenges to the authority of public officers.

B. The principle that the authority of a judge acting in good faith under color of authority as a "regular" or "permanent" judge is not open to challenge by a private litigant in a proceeding before the judge is recognized by all American jurisdictions. Although there is conflict in the states as to whether the title of a "special" or "temporary" judge may be questioned by party litigants, it is the unanimous rule in all jurisdictions which have passed on the problem that the question may not be raised for the first time on appeal. Since the petitioner did not challenge the authority of Judge Jackson to sit until the appellate stage, even those rulings sanctioning a challenge where the objection to the "special" or "temporary" judge's authority is timely lodged in the

court where the judge sits are of no avail to petitioner.

C. The title to office or the exercise of judicial authority of a *de facto* judge may normally be challenged only in a direct proceeding—usually in the nature of a *quo warranto* action—instigated by the sovereignty in whose name the judge is exercising judicial authority. Cf. *Ball v. United States*, 140 U.S. 118. In such a proceeding, the judge is formally made aware of the challenge to his title and is afforded an opportunity to defend his position. In the District of Columbia, this would be done under 16 D.C. Code 1601–1608, Appendix A, *infra*, pp. 128–130.

D. Our position here is not inconsistent with the decision of this Court and the position taken by the government in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685. In that case, the statute eliminated the *office* of retired judges so far as *en banc* proceedings were concerned. The *de facto* principle assumes the existence of a *de jure* office—as is true in the present case.

E. More narrowly, it is significant that no federal case allows a party, knowing the facts upon which the challenge is ultimately rested, to try or argue a case before a judge of a court without in any way challenging his capacity to sit as such judge, and then to attack his competency in subsequent appellate proceedings.

F. The general principle that challenges to jurisdiction may be raised at any time is necessarily inapplicable to this type of case. Those situations to

which the *de facto* doctrine applies almost always involve claims that the court is improperly constituted, i.e., that there is a jurisdictional defect. If such issues could be raised at any stage, nothing would remain of the *de facto* principle and certainly there would be no room for the narrower rule that challenges to the judge's competency must be raised at the earliest opportunity.

## II

Even assuming the "legislative" character of the Court of Customs and Patent Appeals, Congress had power under the District of Columbia clause of the Constitution to authorize the judges of that court (including retired judges) to serve on the superior courts of the District of Columbia.

This Court has always recognized the unique character of the District of Columbia superior courts. Unlike the federal courts located in the states, whose authority derives exclusively from Article III, the superior courts of the District possess jurisdiction derived from joint sources—Article III and the District of Columbia clause—with the result that they may constitutionally be vested with both normal judicial functions and such non-judicial and non-Article III powers as Congress sees fit to confer upon them in the exercise of its plenary legislative authority over the seat of government. Just as Congress can vest those courts with powers and functions which it is constitutionally precluded from conferring on other Article III tribunals, so may it authorize the designation for service thereon of judges who might be constitu-

tionally ineligible for service on the regular Article III courts.

There is no constitutional requirement that criminal justice in the District of Columbia be administered exclusively by judges appointed in the first instance to an Article III court. Congress could have created the entire court system of the District, not merely its inferior courts, pursuant to its power under the District of Columbia clause. In particular, the offense for which petitioner was tried was created and defined by Congress in the exercise of its plenary power to legislate for the District, and jurisdiction could have been vested in one of the inferior courts of the District, whose judges hold term appointments. Congress instead gave this jurisdiction to the District Court; but Congress did not thereby preclude itself from establishing a designation system under which it is possible for the trial of the offense to be presided over by a judge who, though also serving during good behavior, derives his authority from a source in the Constitution other than Article III. Judge Jackson holds life tenure, and his compensation (at least since 1958) has not been subject to the possibility of statutory reduction. He thus possesses in full measure the judicial independence which other members of the federal judiciary enjoy.

### III

Judge Jackson is, and at least since 1958 has been, an Article III judge, fully competent to sit on the District Court for the District of Columbia or any other Article III court to which he may be assigned pursuant to statutory authority regardless of whether

the Court of Customs and Patent Appeals, as a court, is or was a legislative or an Article III court.

A. He has life tenure and performs judicial duties, at least primarily. The provision of the 1958 Act declaring the Court of Customs and Patent Appeals to be a court established under Article III of the Constitution means, at the very least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court. If they were not such before, since the 1958 statute those judges have been Article III judges in the same category as the judges appointed to the various district courts and courts of appeals.

B. The fact that Judge Jackson had retired from the Court of Customs and Patent Appeals when the 1958 Act was enacted is immaterial. His status in this respect was precisely the same as that of the judges of the court who were then active. *Booth v. United States*, 291 U.S. 339, 350-351.

C. No difficulty is raised by the fact that Judge Jackson may also be called to sit in a legislative court (if the Court of Customs and Patent Appeals be deemed such). On that tribunal, his duties would be primarily if not entirely judicial, and the issues with which he would be concerned would arise under the Constitution and laws of the United States. Article III judges may constitutionally exercise judicial power not stemming from Article III, at least so long as it is of the same kind as the powers specified in that Article. And Article III judges (as distinguished, perhaps, from Article III courts) may also

validly perform certain non-judicial functions—as the course of our history proves.

Any claim that Article III and non-Article III functions cannot be mixed is certainly incorrect for the District of Columbia District Court—on which Judge Jackson was sitting. It is clear that the judges of the superior District of Columbia courts may exercise both judicial and non-judicial functions, as well as both Article III and non-Article III functions. *O'Donoghue v. United States*, 289 U.S. 516; *Keller v. Potomac Electric Co.*, 261 U.S. 428.

D. Nor can it be said that the 1958 Act, in renouncing congressional power to terminate the tenure or reduce the compensation of the judges of the Court of Customs and Patent Appeals, so changed the character of the office as to require new Presidential appointments. Congress has often made far more drastic alterations in the tenure or compensation of existing officials without encroaching upon the Presidential power of appointment.

E. The judges of the Court of Customs and Patent Appeals, in our view, would remain Article III judges even if Congress abolished the court and ended or transferred its functions.

F. The Constitution does not prohibit Congress from creating such a corps of Article III judges who may not happen to be regularly assigned to an Article III court but who are available for service in such courts. It is not a constitutional requirement that an Article III judge be assigned to a particular court from the moment of his taking office. So long as he is available to serve on some established Article III

tribunal—as are the judges of the Court of Customs and Patent Appeals and the Court of Claims—the Constitution is satisfied.

#### IV

The Court of Customs and Patent Appeals, as a court, was validly created as, and has always been, an Article III court. In the Act of August 25, 1958, Congress meant simply to declare what powers it exercised when it established the court, not to turn a previously legislative tribunal into a constitutional court.

A. Congress, by the 1958 Act, declared the Court of Customs and Patent Appeals to be a court which *had been* established under Article III.

1. The language of the 1958 amendment shows that this was its purpose.

2. The legislative history of the measure confirms this aim. In 1953 and 1956, Congress enacted with respect to the Court of Claims and the Customs Court the identical legislation which it enacted in 1958 for the Court of Customs and Patent Appeals. All three statutes must be read *in pari materia*. The House Judiciary Committee, in reporting out the bill to declare the Court of Claims to be a court established under Article III, stated that its purpose was to “declar[e] unequivocally” that the Court of Claims “was in fact established as, and continues to be, a constitutional court.” Although some of the language in the Senate report (and a “corrected” report) accompanying a companion Senate bill, and some of the remarks concerning the bills during the Senate de-

bates, tend to suggest that it was the purpose of the legislation to "make" the Court of Claims an Article III court. the pertinent statements, in context, are consistent with the declaratory purpose of the legislation which the House report and the statutory language itself so clearly evidence. The House bill, moreover, was substituted for the Senate bill because it was felt that the language of the House bill more clearly expressed the legislative intent. The legislative materials relating to the later bills show that it was the purpose of those bills to do for the Customs Court and the Court of Customs and Patent Appeals what the earlier bill had done with respect to the Court of Claims.

B. The Court of Customs and Patent Appeals was in fact created by Congress as an Article III court.

1. The court's history shows that Congress so established it.

(a). The pertinent factors are these:

i. The court was created in 1909 to review the customs decisions of the Board of General Appraisers (now the Customs Court). A presiding judge and four associate judges, a court reporter, and the publication of the court's decisions were provided for. The terms of the Act establishing the court (pertaining to such matters as the appointment of a clerk and marshal, the court seal, writs, and allowable costs and fees) are strikingly similar to those of the earlier Act which created the circuit courts of appeals, indisputably Article III courts.

ii. The President was given limited authority, at the request of the presiding judge, to designate cir-

cuit or district judges to sit temporarily in the event of vacancies or the temporary inability or disqualification of a judge or judges—a power later broadened and generalized, and transferred to the Chief Justice.

iii. As in the case of the statute which created the district and circuit courts and implemented the creation of this Court by defining the number of its judges and the number needed to constitute a quorum, no provision applicable to the tenure of the judges was included in the Act creating the Court of Customs Appeals. It was assumed throughout the debates on the bill, and thereafter, that the judges would hold office during good behavior. In 1930, Congress expressly provided—for the first time—that the judges of the court should hold office during good behavior. The legislative history of this enactment, however, makes clear that its purpose was to make explicit what had formerly been assumed.

iv. The court was given “exclusive appellate jurisdiction” to review all final decisions of the Board of General Appraisers in cases respecting the classification of merchandise and rates of duty. This jurisdiction had previously been exercised by the circuit courts, the circuit courts of appeals, and this Court. The debates in Congress reflect with clarity Congress’s awareness that the jurisdiction of the new court would be carved from jurisdiction previously exercised by the regular federal courts. Provision was also made for the transfer to the new court, for review, of cases pending in the circuit courts and circuit courts of appeals at the time of the Act’s passage (including cases which had been decided by the circuit

courts). As a consequence, many of the decisions of the Court of Customs Appeals during the early years of its existence involved cases transferred from the circuit courts and circuit courts of appeals, including many appeals from actual decisions of the circuit courts.

v. The \$10,000 salary initially fixed for the judges of the court was reduced to \$7,000 before the court was staffed. The latter figure was the salary then being received by circuit judges. In subsequent Acts raising judicial salaries, the judges of the Court of Customs Appeals have been treated on a par with circuit judges. The salaries established for judges of the Court of Customs Appeals have always been greater than those fixed for district judges.

vi. When the Judicial Code was enacted in 1911, the provisions pertaining to the Court of Customs Appeals were transferred to the Code, together with the provisions relating to the district courts, the circuit courts of appeals, the Court of Claims, the former Commerce Court, and this Court.

vii. In 1914, this Court was given limited certiorari jurisdiction to review cases from the Court of Customs Appeals. Since 1930, this Court has had general certiorari jurisdiction with respect to customs cases from that court, and has exercised it.

viii. In 1922, the judges of the Court of Customs Appeals were made eligible, on designation of the Chief Justice of the United States, for service on the superior courts of the District of Columbia. In 1958, this eligibility was broadened to include service on

any court of appeals, any district court, the Court of Claims, and the Customs Court.

*ix-x.* Also in 1922, the jurisdiction of the Court of Customs Appeals was enlarged to include appeals on questions of law from findings of the Tariff Commission in proceedings relating to unfair practices in the import trade. And, in 1929, the patent and trade-mark jurisdiction of the Court of Appeals of the District of Columbia was transferred to the Court of Customs Appeals and the name of the court was changed to the Court of Customs and Patent Appeals.

(b). The conclusion to be drawn from the foregoing survey is that it was the congressional purpose, in creating the Court of Customs Appeals, to establish an Article III tribunal, with limited subject-matter jurisdiction but general geographical jurisdiction—the converse, in this respect, of the regular federal courts. Briefly recapitulated, the indicia of this intent are: (i) the federal and judicial nature of the subject matter (customs cases) originally committed to the court; (ii) the parallel between the language creating the court and that creating the circuit courts of appeals; (iii) the eligibility, from the beginning, of circuit and district judges to sit on the court; (iv) the life tenure of its judges from the beginning; (v) the fact that the court's jurisdiction was carved from the jurisdiction of the regular federal courts and that provision was made for the transfer to the new court of cases pending in the circuit courts and circuit courts of appeals on the effective date of the new court's creation (including cases which had been decided by the circuit courts); (vi) Congress's treat-

ment of the court's judges from the beginning as on a par with circuit judges in matters of salary;<sup>3</sup> (vii) the eligibility, since 1922, of its judges to sit on the superior courts of the District of Columbia—an eligibility since broadened to include service on any court of appeals or district court.

2. In the light of the foregoing, we submit that *Ex parte Bakelite Corporation*, 279 U.S. 438—holding the Court of Customs Appeals to be a legislative court, created by Congress under its Article I power to lay and collect duties on imports, and deriving none of its authority from Article III—reached an erroneous conclusion from mistaken premises and failed adequately to take into account the pertinent historical materials.

(a). The basic premises of the *Bakelite* opinion were, first, that a court in which Congress vests jurisdiction which it is not *required* to vest in a court is necessarily a legislative tribunal, and, second, that Congress created the Court of Customs Appeals under Article I, not Article III. In our view, both of these assumptions were mistaken.

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<sup>3</sup> It is not accurate to say that Congress, in 1932, cut the salaries of the judges of the Court of Customs and Patent Appeals. The Legislative Appropriations Act of that year cut the salaries of judges whose compensation was not constitutionally immune to reduction (no court was mentioned by name), and authorized the Treasury to accept from persons whose salaries were immune, on a voluntary basis, such part of their pay as would otherwise not be paid them. The judges of the Court of Customs and Patent Appeals, pursuant to the latter provision, waived any constitutional exemption they might have had and voluntarily remitted to the Treasury such part of their pay as would not be paid them if such reduction were not prohibited.

(b). There is no principle requiring Congress to vest in Article III courts only those matters "which inherently or necessarily require judicial determination," and prohibiting it from requiring Article III judicial determination of matters capable of administrative settlement. There are many areas in which Congress can choose to provide either a judicial remedy or an administrative procedure. The practice of many decades gives firm support to this principle. A substantial part of the business of the federal district courts consists of matters which Congress could clearly commit to executive or administrative determination but has chosen to bring within judicial cognizance, e.g., money, contract, and tort claims against the government. Conversely, a number of present-day administrative tribunals carry on functions which could be, and have in the past been, vested in Article III courts. In some instances, too, the courts and administrative agencies now have concurrent or coordinate jurisdiction.

None of the decisions cited in the *Bakelite* opinion to sustain its premise that only legislative courts can "examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it" (279 U.S. at 451) suggests that proposition. And in the most recent case discussing legislative tribunals (*National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582), each of the four opinions (expressing various views) rejected, explicitly or implicitly, the notion that Article III courts are barred from considering matters not "in-

herently or necessarily" requiring "judicial determination."

(c). The second major premise of the *Bakelite* opinion—that Congress created the Court of Customs Appeals under Article I, not Article III—is equally untenable. The history we have detailed above shows that Congress thought and assumed it was acting to create a special inferior court under Article III. The creation of such a special Article III court to exercise a particular type of jurisdiction is not at all foreign to our history.

(d). Whatever doubt might remain as to the soundness or unsoundness of the *Bakelite* decision, apart from the 1958 declaration of Congress that it established the Court of Customs and Patent Appeals under Article III, ought now to be resolved in favor of the correctness of the congressional conclusion stated in that declaration—*i.e.*, that *Bakelite* mistakenly construed the effect and intent of Congress's action in establishing the court.

C. Finally, we submit that there is no constitutional obstacle to the conclusion that the Court of Customs and Patent Appeals was validly established by Congress under Article III.

1. The customs jurisdiction of the court—its sole initial jurisdiction—has always been purely judicial in character, involving cases arising under the Constitution, laws, and treaties of the United States, and controversies to which the United States is a party.

(a). "*Cases*" and "*controversies*."—The sole jurisdiction of the court at the time of its creation in 1909, and during the first thirteen years of its existence,

was the hearing of appeals from final decisions of the Board of General Appraisers (now the Customs Court) in classification and rate-of-duty cases arising under the customs laws of the United States. Its judgments in such cases have always been final. There can be no doubt that this jurisdiction embraced, and embraces, "cases" within the meaning of Article III.

(b). "*Arising under this Constitution, the Laws of the United States, and Treaties.*"—There can also be no doubt that the "cases" with which the court deals in its customs jurisdiction arise "under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"—within the terms of Article III, Section 2. The *Bakelite* opinion did not intimate any other view, and the rationale of the opinions in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, confirms it.

(c). "*Controversies to which the United States shall be a Party.*"—At least the customs decisions of the court also fall within this category of cases and controversies defined in the second section of Article III. In *Williams v. United States*, 289 U.S. 553, 571-580, this Court, overruling prior statements, construed the phrase "Controversies to which the United States shall be a Party" as embracing only controversies to which the United States is a party *plaintiff*. In *Pope v. United States*, 323 U.S. 1, the government urged that this interpretation was incorrect (but the Court found it unnecessary to reach that question). We adhere to that position. See our brief in *Ghid-*

*den Company v. Zdanok, et al.*, No. 242, this Term. History shows no intention to withhold from the federal courts jurisdiction over claims *against* the government. The flaw in the reasoning in the *Williams* case is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. The premise that Article III is not a consent to suit is correct; but it does not follow that, where such consent is given, a suit against the government is not a "controversy to which the United States shall be a party." While sovereign immunity was well known at the time of the framing of the Constitution, it was equally known that such immunity could be, and had been, waived both in England and here.

2. The subsequent vesting in the Court of Customs Appeals of jurisdiction over matters which may not constitute "cases" within Article III, Section 2, did not affect its Article III status.

(a). It was not until 1922, thirteen years after its creation, that the court was first vested with jurisdiction over a matter which may not involve the adjudication of a case or controversy within Article III, Section 2. This was the power, conferred by the Tariff Act of that year, to hear appeals from findings of the Tariff Commission, on questions of law, in proceedings relating to unfair practices in the import trade. Regardless of whether such appeals present justiciable cases, the conferring of such jurisdiction—which historically has represented a very small fraction of its total business—could not have affected the Article III character of the court if, as we have argued, it had that status previously. And, for the

reasons we shall indicate, we do not believe that the vesting of this additional jurisdiction—even assuming its non-justiciable character—was inconsistent with the court's Article III status.

(b). The court's patent and trade-mark jurisdiction was transferred to it in 1929 from the Court of Appeals of the District of Columbia. This jurisdiction was held to be non-judicial in *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693 (decided prior to the transfer). But see *United States v. Duell*, 172 U.S. 576, an earlier decision (not referred to in the *Postum Cereal* case) which stressed the essentially judicial character of such jurisdiction, notwithstanding that the decision of the court aided an administrative body in making a determination committed to it by Congress. Moreover, the fact that a patent which was issued following an appeal to the District of Columbia Court of Appeals was later challengeable in any court (the principal basis for this Court's conclusion as to the non-judicial character of the Court of Appeals' patent jurisdiction) would not appear to constitute a sound reason for that conclusion, since the same was true with respect to a patent issued pursuant to a proceeding in equity to secure the issuance of a patent—an alternative remedy of unquestionably judicial character.

(c). Even if one accepts the *Postum Cereal* decision as having settled the non-Article III character of the patent and trade-mark jurisdiction now exercised by the Court of Customs and Patent Appeals, the transfer to the court of that jurisdiction was not inconsistent with its Article III status.

*O'Donoghue v. United States*, 289 U.S. 516, indicates that the possession by a federal court of some powers and functions not strictly judicial in character is compatible with its status as an Article III tribunal. That decision recognized the authority of Congress, under its plenary power to legislate for the District, to vest in the courts of the District, in addition to their Article III judicial functions, administrative and legislative functions. We submit that the rationale of the *O'Donoghue* case is equally applicable to the Court of Customs and Patent Appeals. That court has its headquarters at the seat of government, within the area over which Congress possesses exclusive power to legislate. Congress can, pursuant to the same authority which it exercises in conferring non-judicial powers on the courts of the District, constitutionally vest similar powers in the Court of Customs and Patent Appeals, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept, particularly since the court's patent and trade-mark jurisdiction did actually come directly from the District Court of Appeals.

In addition, we suggest that Congress may properly draw upon its other Article I powers in adding non-judicial functions to the Court of Customs and Patent Appeals. The patent, commerce, and customs duties clauses of Article I, Section 8—granting authority to legislate generally in the field of patents, trade-marks, and customs—sustain the establishment of such non-judicial machinery. It is true that this Court and individual Justices have rejected, in general terms,

the exercise by federal courts, other than the District of Columbia courts, of non-judicial functions. But the Court's concern for the nationwide federal court system suggests that there well may be a difference, with respect to joinder of non-judicial with judicial functions, between the regular federal courts and special constitutional tribunals. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment apply with less force to the specialized tribunals with their limited functions and areas of responsibility. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both the necessary Article III powers and also certain "non-judicial" functions, especially if the latter are closely akin to judicial powers (as is the case with the so-called "non-judicial" jurisdiction of the Court of Customs and Patent Appeals).

## V

If the Court of Customs and Patent Appeals was not an Article III court before 1958, the Act of August 25, 1958, made it one.

A. The Act should be given at least prospective effect if it is possible to do so; and a statute "declar[ing]" the court "to be a court established under article III of the Constitution," is certainly capable of being given at least prospective effect—particularly if such construction is necessary to give effect to the congressional intention to the extent constitutionally possible.

B. There is no valid constitutional objection to this construction.

1. The conversion of the court into an Article III court did not require the reappointment and reconfirmation of the incumbent judges. They already had life tenure, and their compensations were fixed by law. By making the court a constitutional court, Congress merely gave up *its* theoretical power to shorten the judges' tenure and cut their salaries. This did not interfere with the President's nominating power—any more than, for example, a statutory increase in the salaries or emoluments of the judges would have done.

2. In any event, whatever rights there were to nominate or to approve the nominations were waived.

3. Since the jurisdiction of the court was already compatible with Article III status, it was unnecessary for the 1958 Act to make any changes in the court's powers and functions in order to give it constitutional stature.

#### **ARGUMENT<sup>4</sup>**

When this case was here before, the parties and *amici* briefed and argued several issues of broad scope (in addition to narrower grounds)—including the correctness and present standing of the fundamental rationale of *Ex parte Bakelite Corporation*, 279 U.S. 438, and *Williams v. United States*, 289 U.S. 553, as well as the general effect and validity of the 1958 Act

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<sup>4</sup> It is unnecessary for the Court to refer further to our earlier brief in this case (No. 669, Oct. Term, 1960). The present brief, while repeating large portions of the prior brief, is a self-contained and complete description of the government's present position.

declaring the Court of Customs and Patent Appeals to be a court established under Article III of the Constitution.<sup>5</sup> On remand, the court below did not pass on these broader questions. It confined itself to holding that, even assuming the "legislative" character of the Court of Customs and Patent Appeals, Congress was empowered by the District of Columbia clause of the Constitution (Article I, Section 8, Clause 17 (Appendix A, *infra*, p. 118)) to authorize the judges of that court (including retired judges) to serve on the superior courts of the District of Columbia. We adhere to that ground of decision but also present other grounds, narrower and broader, in support of the ruling below.

In Point I, *infra*, pp. 27-39, we argue that petitioner had no standing to challenge in his criminal prosecution—at least, for the first time on appeal—the authority of Judge Jackson to preside at his trial, because the judge was, at the minimum, a *de facto* judge.<sup>6</sup>

In Point II, *infra*, pp. 39-42, we support the ruling below that the judges of the Court of Customs and Patent Appeals can be validly assigned to sit on the superior courts of the District of Columbia, regardless of their competency to sit on other district courts and courts of appeals.

In Point III, *infra*, pp. 43-51, we urge that at least since 1958 the judges of the Court of Customs and

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<sup>5</sup> Act of August 25, 1958, § 1, 72 Stat. 848 (Appendix A, *infra*, p. 121).

<sup>6</sup> The *de facto* argument was not referred to either in the *per curiam* opinion of the court of appeals (R. 38-41) or in Judge Prettyman's concurring opinion (R. 43-49).

Patent Appeals, including all retired judges, have been Article III judges fully competent to sit on any Article III court to which they may be assigned pursuant to statutory authority—regardless of whether the Court of Customs and Patent Appeals be deemed a “legislative” or a “constitutional” court.

Finally, in Point IV, *infra*, pp. 51–113, we argue that the Court of Customs and Patent Appeals has always been an Article III tribunal, and in Point V, *infra*, pp. 114–117, that in any event it has been such since the 1958 Act.

#### I. JUDGE JACKSON WAS AT LEAST A *DE FACTO* JUDGE, WHOSE AUTHORITY PETITIONER, AS A DEFENDANT IN A CRIMINAL TRIAL, LACKED STANDING TO CHALLENGE—IN ANY EVENT FOR THE FIRST TIME ON APPEAL

There can be no question that the *office* which Judge Jackson held during petitioner’s trial—the office of District Judge of the District Court for the District of Columbia—is a lawful or *de jure* one. Admittedly, the assignment of Judge Jackson—a judge with life tenure—is authorized by a law of Congress, 28 U.S.C. 294 (Appendix A, *infra*, pp. 120–121).<sup>7</sup> Judge Jackson’s designation by the Chief Justice of the United States to sit on the District Court was made under and in accordance with that Act of Congress.<sup>8</sup> Judge Jackson, in good faith, filled that office and

<sup>7</sup> Because of the assignment statutes (28 U.S.C. 291–296), it cannot be said that there is any fixed number of judges of the District Court. Judge Jackson’s designation (see Pet. Br. 11–12) was “to serve as a district judge of the United States District Court for the District of Columbia and discharge the official duties thereof \* \* \*.”

<sup>8</sup> There is no challenge to the regularity of the designation.

exercised the normal judicial functions incident thereto. In these circumstances, Judge Jackson was, at the least, a *de facto* judge, whose title to office was not subject to challenge by the petitioner as a defendant in a criminal trial—in any case not for the first time on appeal.

A. The rule is settled in the federal courts that, where a judge, in good faith and under color of authority, is in actual possession of and discharging the duties of a *de jure* office, a party litigant has no standing to challenge the title of the judge to hold the office or the exercise by the judge of judicial authority, whether the judge is regularly or temporarily filling the office. *Ex parte Ward*, 173 U.S. 452, 454; *McDowell v. United States*, 159 U.S. 596, 601-602; *Ball v. United States*, 140 U.S. 118, 128-129; *Leary v. United States*, 268 F. 2d 623, 627 (C.A. 9); *United States v. Marachowsky*, 213 F. 2d 235, 245 (C.A. 7), certiorari denied, 348 U.S. 826. See *Johnson v. Manhattan Ry. Co.*, 61 F. 2d 934, 938 (C.A. 2).<sup>9</sup>

In *McDowell v. United States*, *supra*, 159 U.S. at 601-602, in answer to the defendant's contention, in a criminal case, that the circuit judge lacked the authority to appoint District Judge Seymour from

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<sup>9</sup> In *Donegan v. Dyson*, 269 U.S. 49, the Chief Justice of the United States, pursuant to statute, designated Judge Mack, formerly of the Commerce Court, to sit in the District Court for the Southern District of Florida. The petitioner in that case was subsequently convicted on a criminal charge in the district court, the trial of which was presided over by Judge Mack. This Court, in sustaining the authority of Judge Mack, held that his designation was proper under the statute, and that, therefore, it was unnecessary to consider the applicability of the *de facto* doctrine. *Id.* at 54.

another district to fill a vacancy in the district of trial, this Court ruled:

Whatever doubt there may be as to the power of designation attaching in this particular emergency, the fact is that Judge Seymour was acting by virtue of an appointment, regular on its face; and the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.

In *Ex parte Ward*, *supra*, 173 U.S. 452, a convicted defendant challenged by habeas corpus the jurisdiction of the presiding judge to discharge judicial functions since he had not been at the time confirmed by the Senate. While the holding of the Court was that the question could not be raised on habeas corpus, the Court's reference to its prior *McDowell* decision indicates that it deemed the *de facto* doctrine applicable even if raised on direct attack. See *Ball v. United States*, *supra*, 140 U.S. at 128-129.

The *de facto* doctrine is grounded upon principles of public policy to avoid the confusion, uncertainty, and delay which would result from challenges to the authority of public officers.<sup>10</sup> As this Court put it in *Norton v. Shelby County*, 118 U.S. 425, 441-442:

The doctrine which gives validity to acts of officers *de facto* \* \* \* is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are

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<sup>10</sup> See also *Commonwealth v. Di Stasio*, 297 Mass. 347, 351, certiorari denied, 302 U.S. 683; *Sylvia Lake Co. v. Northern Ore Co.*, 242 N.Y. 144, 147-148, certiorari denied, 273 U.S. 695.

created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some *regular mode prescribed by law* their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. \* \* \* [Emphasis added]

B. The principle that the authority of a judge acting in good faith under color of authority as a "regular" or "permanent" judge is not open to challenge by a private litigant in a proceeding before the judge is recognized by all American jurisdictions.<sup>11</sup>

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<sup>11</sup> *E.g., Spradling & Thomas v. State*, 17 Ala. 440, 446; *Humel v. Hoogendorn*, 5 Alaska 25, 27; *Logan v. Harris*, 213 Ark. 37, 39-40; *People v. Sassoovich*, 29 Cal. 480, 485; *Gorman v. People*, 17 Colo. 596, 597 (*dictum*); *State v. Carroll*, 38 Conn. 449, 464-472; *Territory v. Mattoon*, 21 Haw. 672, 674-675; *State v. Malcolm*, 39 Ida. 185, 193 (*dictum*); *People ex rel. Ballou v. Bangs*, 24 Ill. 184, 186-187 (*dictum*); *Rogers v. Beauchamp*, 102 Ind. 33, 36-37; *State v. Miller*, 71 Kan. 491, 492; *Orme v. Commonwealth*, 21 Ky. L. Rep. 1412, 1413-1414; *State v. Sadler*, 51 La. Ann. Rep. 1397, 1401-1410; *Brown v. Lunt*, 37 Me. 423, 428-433; *Commonwealth v. DiStasio*, 297 Mass. 347, 350-352, certiorari denied, 302 U.S. 683; *People v. Townsend*, 214 Mich. 267, 270-271; *State v. Brown*, 12 Minn. 538; *Pringle v. State*, 108 Miss. 802, 809; *State v. Rich*, 20 Mo. 393, 396-397 (*dictum*); *Tucker v. Myers' Estate*, 151 Neb. 359, 367; *Walcott v. Wells*, 21 Nev. 47, 54-56; *Byer v. Harris*, 77 N.J.L. 304, 309; *State v. Blancett*, 24 N. Mex. 433, 448-449, writ of error dismissed, 252 U.S. 574; *Sylvia Lake Co. v. Northern Ore Co.*, 242 N.Y. 144, 147-148, certiorari denied, 273 U.S. 695; *State v. Harden*, 177 N.C. 580, 583-584; *Youmans v. Hanna*, 35 N.D. 479, 518-523; *Stiess v. State*, 103 Ohio St. 33, 41-43; *Morgan v.*

The *de facto* doctrine has been applied to deny standing to private litigants who have challenged the very right of the incumbent to hold judicial office. *E.g., Pringle v. State*, 108 Miss. 802, 808-809 (where the judge was appointed by the governor, while the state constitution required that judges be elected by the populace); *Orme v. Commonwealth*, 21 Ky. L. Rep. 1412, 1413-1414 (where an individual was elected as judge, but there was no ordinance providing for the calling of the election, as state law required); *Snow v. State*, 134 Tex. Crim. App. 263, 265-267 (where the challenged party, during the same term of the legislature for which he was elected, was selected as a judge, the state constitution expressly denying the eligibility of a legislator to hold office as a judge during the same term of the legislature which raised the emoluments of the particular judicial office). See also *Commonwealth v. Di Stasio*, 297 Mass.

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*State*, 66 Okla. Crim. Rep. 205, 210-211; *State ex rel. Madden v. Crawford*, 207 Ore. 76, 90; *Clark v. Commonwealth*, 29 Pa. St. 129, 138; *Cromer v. Boinest*, 27 S.C. 436, 441-444; *State v. Ness*, 75 S.D. 373, 376-377; *Ridout v. State*, 161 Tenn. 248, 268; *Snow v. State*, 134 Tex. Crim. Rep. 263, 266-268; *McGregor v. Balch*, 14 Vt. 428, 436-437; *McCraw v. Williams*, 74 Va. 510, 512-514; *State v. Britton*, 27 Wash. 2d 336, 344-346; *State v. Carter*, 49 W. Va. 709, 711-712; *Baker v. State*, 80 Wis. 418, 419. Cf. *Jeffords v. Hine*, 2 Ariz. 162, 168-169; *State ex rel. James v. Deakyne*, 44 Del. 217, 222-223; *Florida ex rel. Attorney General v. Gleason*, 12 Fla. 190, 229-234, writ of error dismissed *sub. nom. Gleason v. Florida*, 9 Wall. 779; *Crawford v. Howard*, 9 Ga. 314, 316-317; *Ex parte Strahl*, 16 Ia. 369, 370-371; *Buckler v. Bowen*, 198 Md. 357, 365-367; *Marcellus v. Wright*, 61 Mont. 274, 289-290; *Attorney General v. Megin*, 63 N.H. 378, 379; *State v. Lane*, 16 R.I. 620, 626; *May v. City of Laramie*, 58 Wyo. 240, 276. See *Wenner v. Smith*, 4 Utah 238, 245.

347, certiorari denied, 302 U.S. 683; *State v. Blancett*, 24 N. Mex. 433, 446-447.

There is, however, conflict in the states as to whether the title of a "special" or "temporary" judge may be questioned by party litigants. Some courts, following the general rule as to regular or permanent judges, will not permit such attack. *E.g., Bird v. State*, 154 Miss. 493, 499-500; *State v. Miller*, 111 Mo. 542, 549; *Barden v. State*, 98 Neb. 180, 182; *State v. Harden*, 177 N.C. 580, 583-584; *Garza v. State*, 120 Tex. Crim. Rep. 147, 148. Other courts, on the theory that such a judge possesses the right to hold office only through some special type of selection, permit such challenges if made in a timely fashion in the court where the temporary or special judge sits. *E.g., Lillie v. Trentman*, 130 Ind. 16, 20-21; *Schlunger v. State*, 113 Ind. 295, 296; *Salyer v. Napier*, 21 Ky. L. Rep. 172, 173; *Lacy v. Barrett*, 75 Mo. 469, 472-473; *State v. Holmes*, 12 Wash. 169, 179-180.

However, it is the unanimous rule in all American jurisdictions (which have passed on the problem) that the question may not be raised for the first time on appeal. See *e.g., Lamar v. United States*, 241 U.S. 103; *Moreno Rios v. United States*, 256 F. 2d 68 (C.A. 1); *United States v. Marachowsky*, 213 F. 2d 235 (C.A. 7), certiorari denied, 348 U.S. 826; *Greenwood v. State*, 116 Ind. 485; *State v. Schuermann*, 146 La. 110; *Bird v. State*, 154 Miss. 493; *Rives v. Pettit*, 4 Ark. 582. As the Supreme Court of Indiana stated in refusing to entertain the appellant's collateral attack upon a special judge who presided over the cause (*Lillie v. Trentman, supra*, 130 Ind. at 21):

A practice that would permit a party litigant to proceed for months before a *de facto* judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then, if not satisfied with some of his rulings, or not disposed to go into trial, when the cause is ready for trial, to be able, in a moment, to arrest proceedings, and oust the jurisdiction of the judge, can not be tolerated.

Since the petitioner did not challenge the authority of Judge Jackson to sit until the appellate stage, even those rulings sanctioning a challenge where the objection to the "special" or "temporary" judge's authority is timely lodged in the court where the judge sits are of no avail to this petitioner.

C. The title to office or the exercise of judicial authority of a *de facto* judge may normally be challenged only in a direct proceeding—usually in the nature of a *quo warranto* action—instituted by the sovereignty in whose name the judge is exercising judicial authority.<sup>12</sup> See 1 Freeman, *Judgments* (5th ed., 1925), Sec. 327, and cases cited; Church, *Habeas Corpus* (2d ed., 1893), Secs. 256, 257, and cases cited.

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<sup>12</sup> *Spradling & Thomas v. State*, 17 Ala. 440, 446; *Jeffords v. Hine*, 2 Ariz. 162, 168-169; *State of Florida v. Gleason*, 12 Fla. 190; *People ex rel. Ballou v. Rangs*, 24 Ill. 184, 186-187; *Ex parte Strahl*, 16 Ia. 369, 371; *State v. Williams*, 61 Kan. 739, 741; *State v. Sadler*, 51 La. Ann. Rep. 1397, 1402; *Answer of the Justices*, 122 Mass. 600, 603, 604; *State v. Rich*, 20 Mo. 393, 396-397; *Walcott v. Wells*, 21 Nev. 47, 54-55; *State ex rel. Bockmeier v. Ely*, 16 N.D. 569; *Sylvia Lake Co. v. Northern Ore Co.*, 242 N.Y. 144, 147, certiorari denied, 273 U.S. 695; *Stiess v. State*, 103 Ohio St. 33, 41; *Morgan v. State*, 66 Okla. Crim. Rep. 205, 210-211; *Ridout v. State*, 161 Tenn. 248, 259-260; *Snow v. State*, 134 Tex. Crim. Rep. 263, 266-268; *McGregor v. Balch*, 14 Vt. 428, 437.

Cf. *Ball v. United States*, *supra*, 140 U.S. at 128-129; *Ex parte Ward*, *supra*, 173 U.S. at 456. In such a proceeding, the judge is formally made aware of the challenge to his authority and is afforded an opportunity to defend his position. In the District of Columbia, this would be done under 16 D.C. Code 1601-1608 (Appendix A, *infra*, pp. 128-130). It is there provided that the Attorney General of the United States or the United States Attorney for the District of Columbia may institute, either on his own motion or on the relation of a third party, a proceeding in *quo warranto* to try the right of any person claimed to be illegally occupying any public office (§§ 1601-1602); should the Attorney General or United States Attorney refuse to act in the matter, any interested person may institute such a proceeding by filing a verified petition in the District Court for the District of Columbia and complying with prescribed conditions as to security for costs (§ 1603).<sup>13</sup>

D. Our position in this case—that Judge Jackson was at least a *de facto* judge whose title to office and whose exercise of judicial authority are not open to attack in this proceeding (at least not for the first time on appeal)—is not inconsistent with the decision of this Court and the position taken by the government in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685. In that case, a retired judge of the Court of Appeals for the Second Circuit sat during an *en banc* rehearing and cast the decisive vote, although 28 U.S.C. 46(c) expressly limited *en banc* proceedings to the “active circuit judges of the

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<sup>13</sup> See *Newman v. Frizzell*, 238 U.S. 537.

circuit." The government contended that the retired judge could not be deemed a *de facto* judge because a specific legislative mandate precluded him from participating in the *en banc* proceedings. See Brief for the United States in *United States v. American-Foreign Steamship Corp.*, No. 138, Oct. Term, 1959, pp. 24-28. In other words, 28 U.S.C. 46(c), eliminating retired circuit judges from *en banc* proceedings in the courts of appeals, also eliminated the *office* of retired judges in those matters. And, since there cannot be a *de facto* judge unless there is first a *de jure* office to fill (*Norton v. Shelby County, supra*, 118 U.S. at 443-444, 449; see *In re Manning*, 139 U.S. 504, 506-507), the retired judge in the *American-Foreign* case could not have been a *de facto* officer; there was no *office* for him to fill.<sup>14</sup> (In addition, in the *American-Foreign* case, the United States contested the right of the retired circuit judge to sit on the *en banc* court as soon as it was apprised that he had done so. See 363 U.S. at 687.) In the instant case, it is undisputed that Judge Jackson occupied a *de jure* office—District Judge on the District Court for the District of Columbia—and since he filled that office in good faith and under color of authority without

<sup>14</sup> The government's brief in the *American-Foreign Steamship Corp.* case (Brief for the United States, Oct. Term, 1959, No. 138, p. 27, incl. fn. 25) pointed out that the *de facto* principle has been applied, *inter alia*, where the judge's right to office is in question, and declared that "there is no dispute here over Judge Medina's status at the crucial moment of *en banc* decision: he was a retired, non-active judge. The only question presented \* \* \* is whether as a retired judge on July 28, 1958 [the date of the *en banc* decision], he had the power to decide this case under the provisions of 28 U.S.C. 46(c)."

challenge at the time, he was at least a *de facto* occupant of the office.

Similarly, *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, turned on the *de jure* composition of the court itself. There, a three-judge district court was convened according to law and heard the case. When one of the judges subsequently became ill, the remaining two judges determined the matter without the assistance of the third judge. This Court, in holding the action taken by the two judges to be void, pointed out that the statute specifically required that such cases be determined by a district court of three judges. The Court said that the requirement of a three-judge district court "is not a broad social measure to be construed with liberality. It is a technical rule of procedure to be applied as such." *Id.* at 136. The statute in *Ayrshire*, unlike the situation at bar, took away the *offices* of two of the judges of the three-judge district court during the absence of the third judge—*i.e.*, the *office* of judge on a three-judge district court exists in legal contemplation only when three such judges, no more and no less, are sitting as such. That is not the case here, for the *office of District Judge* of the District Court for the District of Columbia exists irrespective of the mode or the manner in which Judge Jackson was selected to fill that office or of Judge Jackson's qualifications to do so.

*Frad v. Kelly*, 302 U.S. 312, posed a different problem. There, a judge sitting by designation in the Southern District of New York concluded a criminal case. Subsequently, while acting in his regular ca-

pacity as a judge of the Eastern District, he, with the consent of the parties, entertained a petition in the case for discharge from probation and termination of proceedings under the provisions of the Probation Act. This Court held that this petition was a new matter which could be determined only by the court of the district of trial. Since the judge did not even purport to act as a judge of the Southern District (the district of trial), when he ruled on the discharge from probation,<sup>15</sup> the *de facto* doctrine was not really involved. As we have stressed, that doctrine applies only where the judge purports to be filling a *de jure* office, not where the existence of the office is itself in question.<sup>16</sup>

E. More narrowly, it is significant that, so far as we are aware, no federal case allows a party, knowing the facts upon which the challenge is ultimately rested, to try or argue a case before a judge of a court without in any way challenging his capacity to sit as such judge and then to attack his competency in subsequent appellate proceedings. See *supra*, pp. 32-33. In *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, *supra*, the government contested the

<sup>15</sup> The application for discharge from probation and termination of proceedings was made, in the applicant's words, to "Honorable Robert A. Inch, United States District Judge of the Eastern District of New York", and Judge Inch's order granting such discharge (although captioned in the Southern District) referred to himself, as of the time of the original probation order, as "*then* duly assigned to a criminal term in and for the Southern District of New York" (No. 87, Oct. Term 1937, R. 27, 28, emphasis added).

<sup>16</sup> The *Frad* case was not treated by the parties or this Court as if it involved the *de facto* doctrine.

right of Judge Medina to sit on the *en banc* court as soon as it was apprised that he had done so. In *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, *supra*, the appeal to this Court was the first occasion to attack the composition of the district court; three judges sat at the hearing, and it was only at the announcement of the opinion and judgment that it appeared that only two judges had participated in the decision. See 331 U.S. at 134. Similarly, in *American Construction Co. v. Jacksonville Railway*, 148 U.S. 372, 387, it appears probable that the participation of the circuit judge whose sitting on the court of appeals was challenged first came to the attention of the parties when the court's order was handed down; and immediately thereafter a petition for rehearing in the court of appeals challenged the judge's participation (see 148 U.S. at 376-377). Finally, in *Frad v. Kelly*, 302 U.S. 312, *supra*, the United States Attorney for the Southern District of New York (who had apparently not participated in the probation hearing held in the Eastern District, 302 U.S. at 313, 319) recognized that the order made in the Eastern District was invalid and moved to have it vacated and resettled in the Southern District (302 U.S. at 314). Before that could be accomplished other controlling events transpired (302 U.S. at 314), but the significant point is that the United States had timely challenged the Eastern District order which was held invalid by this Court.

F. The general principle that challenges to jurisdiction may be raised at any time is necessarily inapplicable to this type of case. Those situations to

which the *de facto* doctrine applies almost always involve claims that the court is improperly constituted, i.e., that there is a jurisdictional defect. If such issues could be raised at any stage, then nothing would remain of the *de facto* principle and certainly there would be no room for the narrower rule that challenges to the judge's competency must be raised at the earliest opportunity. Like certain other "jurisdictional" requisites which are waived if not presented at an early stage, challenges to judicial authority should be raised promptly after the governing facts are or should have been known. It is unseemly for a litigant to be able to hold back an attack on a judge's competency until counsel can appraise the judge's attitudes or rulings. The policy which created the *de facto* doctrine (see *supra*, pp. 29-30, 33) rejects all such delay in presenting a challenge.

## II. EVEN ASSUMING THE "LEGISLATIVE" CHARACTER OF THE COURT OF CUSTOMS AND PATENT APPEALS, CONGRESS HAD POWER UNDER THE DISTRICT OF COLUMBIA CLAUSE OF THE CONSTITUTION TO AUTHORIZE THE JUDGES OF THAT COURT (INCLUDING RETIRED JUDGES) TO SERVE ON THE SUPERIOR COURTS OF THE DISTRICT

This Court has always recognized the unique character of the superior courts of the District of Columbia. *O'Donoghue v. United States*, 289 U.S. 516, 545-548, 550-551; *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 467-468; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 698-701; *Keller v. Potomac Electric Co.*, 261 U.S. 428, 440-443; *Butterworth v. Hoe*, 112 U.S. 50, 60. Unlike the federal courts located in the states, whose

authority derives exclusively from Article III, the superior courts of the District are vested with jurisdiction derived from joint sources—Article III and the District of Columbia clause (*O'Donoghue v. United States, supra*)—with the result that they may constitutionally be vested with both normal judicial functions and such non-judicial functions as Congress sees fit to confer upon them in the exercise of its plenary legislative authority over the seat of government. See, e.g., *Federal Radio Commission v. General Electric Co., supra* (review of radio station licensing); *Keller v. Potomac Electric Co., supra* (review of rate-making).

This unique status of the superior courts of the District of Columbia provides adequate support, we think, for the court of appeals' holding. Just as Congress can vest those courts with powers and functions which it is constitutionally precluded from conferring on other federal tribunals established under Article III, so may it authorize the designation for service thereon of judges who might be—and we assume for present purposes would be—constitutionally ineligible for service on regular Article III courts. Since 1922 Congress has provided that judges of the Court of Customs and Patent Appeals may be assigned to the higher courts of the District of Columbia (see *infra*, pp. 76-77), and Judge Prettyman's opinion below shows that that authority has often been exercised (R. 43-45).

It is true, of course, as petitioner observes (Br. 36), that Congress's power to legislate for the District is subject to and limited by other provisions

of the Constitution. Congress could not, for example, eliminate trial by jury in the District, or otherwise impinge on specific constitutional guaranties. *Callan v. Wilson*, 127 U.S. 540, 550; *Capital Traction Company v. Hof*, 174 U.S. 1, 5; *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 434-435; *Bolling v. Sharpe*, 347 U.S. 497, 499. There is, however, no constitutional requirement that criminal justice in the District of Columbia be administered exclusively by judges appointed in the first instance to an Article III court. Congress could have created the entire court system of the District, not merely its inferior courts, pursuant to its power under the District of Columbia clause. Indeed, prior to the *O'Donoghue* decision, 289 U.S. 516, 550 (rejecting a *dictum* contrary to that holding in *Ex parte Bakelite Corporation*, 279 U.S. 438, 450), it had been assumed that Congress had done so.

The offense for which petitioner was tried—robbery, in violation of the District of Columbia Code—was created and defined by Congress in the exercise of its plenary power to legislate for the District. Petitioner concedes, as he must, that Congress could, in the exercise of this same plenary power, have vested the authority to try this offense in one of the inferior courts of the District, such as the Municipal Court, whose judges hold ten-year appointments (11 D.C. Code 753) Br. 39).<sup>17</sup> He argues, however, that, since Congress did not in fact do so, but gave this jurisdic-

<sup>17</sup> Petitioner does not suggest that Congress was not free to provide tenure less than tenure during good behavior for the judges of that court.

tion to the District Court, it was constitutionally precluded from establishing a designation system under which it might be possible for the trial of the offense in the District Court to be presided over by a judge who, though serving during good behavior, derives his basic position from a source in the Constitution other than Article III (Br. 39-40). We submit that the Constitution imposes no such fetters on Congress in its exercise of its plenary power to legislate for the District. There is no occasion to consider here whether that authority is sufficiently broad to permit the assignment to the District Court of judges not possessing life tenure.<sup>18</sup> For that is not the case here. Judge Jackson holds life tenure, and his compensation, at least since the 1958 Act declaring the Court of Customs and Patent Appeals to be a tribunal established under Article III (if not before), has not been subject to the possibility of statutory reduction.<sup>19</sup> He thus possesses in full measure the judicial independence which other members of the federal judiciary enjoy, and which it was the purpose of Article III to insure. In holding that he could validly preside at petitioner's trial, the court below has not departed from the basic principle of *O'Donoghue v. United States*, 289 U.S. 516.

<sup>18</sup> Cf. Pet. 9, where petitioner suggested that under the rationale of the court of appeals' decision "a judge of the Municipal Court for the District of Columbia could be assigned to the District Court by virtue of the District clause."

<sup>19</sup> See *infra*, pp. 43ff.

III. JUDGE JACKSON IS, AND AT LEAST SINCE 1958 HAS BEEN, AN ARTICLE III JUDGE, FULLY COMPETENT TO SIT ON THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA OR ANY OTHER ARTICLE III COURT TO WHICH HE MAY BE ASSIGNED PURSUANT TO STATUTORY AUTHORITY

Regardless of the status of the Court of Customs and Patent Appeals, as a court, in 1952 (when Judge Jackson retired from it), in 1958 (when Congress declared it to be a court established under Article III), or today,<sup>20</sup> Judge Jackson is and has been (at least since 1958) an Article III *judge*, fully competent to sit on the District Court for the District of Columbia—or any other Article III court to which he may be assigned pursuant to statutory authority.

A. We may assume for this point that a defendant in a criminal case in the District Court for the District of Columbia is entitled to be tried before an Article III judge, even where, as here, the offense for which he is tried is an offense against the District of Columbia Code, enacted by Congress under its plenary legislative authority with respect to the District. But what this means is that the judge must have life

<sup>20</sup> It would be possible for a court to be considered a legislative court even though its judges (or some of them) are Article III judges, if the touchstone for testing the status of a federal court (as this Court has stated it) remains the power actually exercised by Congress in creating the tribunal. See *Ex parte Bakelite Corporation*, 279 U.S. 438, 459-460; *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 640-641 (opinion of Vinson, C. J.). Under that test, if the power exercised lies outside of Article III, the court is a legislative one.

tenure, that his pay be incapable of being reduced, and that he perform judicial functions.<sup>21</sup>

Judge Jackson has all the qualifications of an Article III judge. He has life tenure and performs judicial duties. The provision of the 1958 Act amending the statutory "charter" of the Court of Customs and Patent Appeals (28 U.S.C. 211) so as to declare the court "to be a court established under article III of the Constitution of the United States" (Appendix A, *infra*, pp. 119, 121) means, at the very least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court. If they were not such before, since the 1958 statute those judges have been Article III judges in the same category as the judges appointed to the various district courts and courts of appeals. The Act has had that effect—at the minimum.

B. The fact that Judge Jackson had retired from the Court of Customs and Patent Appeals at the time of enactment of the 1958 Act (he retired in 1952) is wholly irrelevant. His status in this respect was precisely the same as that of the judges of the court who were then active. Judge Jackson is still a judge appointed to the Court of Customs and Patent Appeals; he did not receive a new office when he retired in 1952

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<sup>21</sup> Article III, Section 1, of the Constitution provides that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office" (Appendix A, *infra*, p. 119).

and he does not hold one now. As this Court said in *Booth v. United States*, 291 U.S. 339, at 350-351:

By retiring pursuant to the statute a judge does not relinquish his office. The language is that he may retire from regular active service. The purpose is, however, that he shall continue, so far as his age and his health permit, to perform judicial service \* \* \*. \* \* \* The Act does not and, indeed, could not, endue him with a new office, different from, but embracing the duties of the office of judge. He does not surrender his commission, but continues to act under it. \* \* \*

See also *Donegan v. Dyson*, 269 U.S. 49; *Boomhower, Inc. v. American Automobile Insurance Co.*, 220 F. 2d 488, 490-491 (C.A.D.C.), certiorari denied, 350 U.S. 833; *United States v. Moore*, 101 F. 2d 56, 59 (C.A. 2), certiorari denied, 306 U.S. 664.

C. No difficulty is raised by the fact that Judge Jackson may also be called to sit in a legislative court (if the Court of Customs and Patent Appeals be deemed such).<sup>22</sup> On that tribunal, his duties would be primarily judicial (on any view of the court's patent and trade-mark jurisdiction; see *infra*, pp. 104-113) and the issues with which he would be concerned would arise under the Constitution and laws of the United States. It is settled, we believe, that Article III judges may constitutionally exercise judicial power not stemming from Article III, at least so long as it is of the same kind as the powers specified in that Article. See *United States v. Duell*, 172 U.S. 576, 589.

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<sup>22</sup> In Judge Jackson's case, service on the court would have to be wholly voluntary since he is retired.

This Court and the courts of appeals have heard cases from Alaska, Hawaii, Puerto Rico, the Virgin Islands, and the Philippines, as well as from other former territories—in cases in which judicial power has been exercised under provisions of the Constitution other than Article III. To the extent that the Customs Court, the Court of Customs and Patent Appeals, and the Court of Claims have been considered legislative tribunals (*Ex parte Bakelite Corporation*, 279 U.S. 438; *Williams v. United States*, 289 U.S. 553), the Justices of this Court have been deciding, on review, issues from courts thought to be established under Article I rather than Article III. See *Pope v. United States*, 323 U.S. 1, 13–14. Similarly, there would be no reason why a circuit judge or a district judge from a district within a state could not sit, by assignment, on the District Court for Puerto Rico, for the Virgin Islands, or for Hawaii (before it became a state); and regardless of whether the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals are constitutional courts, there appears to be no valid constitutional reason why circuit and district judges, as well as retired Justices of this Court, would be incompetent to sit on those tribunals.<sup>22</sup>

Moreover, history and practice show that there is no rigid rule precluding Article III judges from exercising any non-judicial function. Constitutional judges have not infrequently accepted and per-

<sup>22</sup> In recent years, district and circuit judges have sat on the Court of Claims and the Court of Customs and Patent Appeals, and Justices Reed and Burton have sat on the former.

formed non-judicial governmental assignments of various kinds, while retaining their judicial offices. See Hart and Wechsler, *The Federal Courts and the Federal System* (1953), pp. 102-105. Perhaps the most important instance was the participation by five Justices in the Presidential Election Commission of 1877, pursuant to the Act of January 29, 1877, 19 Stat. 227, 228 (see Morison and Commager, *The Growth of the American Republic* (4th ed., 1956), vol. 2, pp. 77-78). At the present time constitutional judges regularly sit on official judicial conferences which recommend legislation to Congress and take other steps not strictly within the judicial power granted by Article III. An important part of the duties of this Court has been the prescribing of federal rules of civil, admiralty, and criminal procedure, which, upon being reported to Congress by the Chief Justice, have the force and effect of statute. 28 U.S.C. 2072-2073; 18 U.S.C. 3771-3772; e.g., 308 U.S. 645 ff.; 327 U.S. 821 ff.; 329 U.S. 839 ff.; 334 U.S. 864 ff.; 335 U.S. 917 ff.; 341 U.S. 959 ff.; cf. 11 U.S.C. 53 (bankruptcy rules, forms, and orders); 331 U.S. 871 ff.; 355 U.S. 969. Judges of some lower courts appear to have given opinions to legislative bodies, in the role of commissioners and not strictly as Article III judges (see footnote 75, *infra*, p. 113). See also the extradition statutes, 18 U.S.C. 3184, 3186.

The general principle thus illustrated is, we believe, that Article III judges (as distinguished, perhaps, from Article III courts) may validly perform certain non-Article III or non-judicial functions while

retaining their positions as constitutional judges. The extent to which this can be done is still unclear, but we submit that non-judicial or non-Article III duties which are closely related or comparable to judicial functions under Article III are most probably within the allowable area. To the extent that the judges of the Court of Customs and Patent Appeals may exercise such non-judicial and non-Article III powers in the fields of tariff law, patents, and trade-marks (see *infra*, pp. 102-113), their duties are both closely related and comparable to the "judicial power" which is the subject of Article III. See the discussion, *infra*, pp. 105-108, 112-113.

In any event, a claim that Article III and non-Article III functions cannot be mixed is wholly incorrect for the District of Columbia District Court, on which Judge Jackson was sitting. If one thing is clear in this field of the law, it is that the judges of the superior District of Columbia courts may exercise both judicial and non-judicial functions, as well as both Article III functions and non-Article III functions. *O'Donoghue v. United States*, 289 U.S. 516, 545-548; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693; *Keller v. Potomac Electric Co.*, 261 U.S. 428. See also *supra*, pp. 39-42, and *infra*, pp. 109-112.

D. Nor can it be said that the 1958 Act, in renouncing congressional power to terminate the tenure or reduce the compensation of the judges of the Court of Customs and Patent Appeals, so changed the character of the office as to require new Presidential appointments. These judges already had life tenure, on

appointment of the President, and their salaries were fixed by law. Congress merely gave up its potential authority to shorten their terms or to lower their compensation. Though this change sufficed to make the members of the court (including retired judges) Article III judges,<sup>24</sup> it did not interfere with the President's appointment power, any more than would a statutory increase in salary or emoluments. Cf. *Shoemaker v. United States*, 147 U.S. 282, 301; and see *infra*, pp. 115-116, where we argue that the 1958 Act, if construed as having changed the *court* from a legislative to a constitutional tribunal, did not require the reappointment and reconfirmation of the incumbent judges. Congress has often made far more drastic alterations in the tenure or compensation of existing officials without encroaching upon the Presidential power of appointment—changes in salary, retirement benefits, other emoluments, duties, and even terms of office. In the absence of a clear congressional purpose to abolish the old office and create a new one, a change of the type involved here does not constitutionally require a new appointment and new confirmation.

E. Under our view, the judges of the Court of Customs and Patent Appeals would remain Article III judges even if Congress abolished the court and ended or transferred its functions. When the Commerce Court was abolished in 1913, its judges continued as circuit judges assigned to other Article III courts. On the Commerce Court, see footnote 48, *infra*, pp. 75-

<sup>24</sup> We are assuming, *arguendo*, in this section of our brief, that the judges were not constitutional judges before 1958.

76; Frankfurter and Landis, *The Business of the Supreme Court* (1928), pp. 153-174, 234; *Donegan v. Dyson*, 269 U.S. 49.

F. The Constitution does not prohibit Congress from creating such a corps of Article III judges who may not happen to be regularly assigned to an Article III court. It is true that Article III, Section 1, refers to "such inferior Courts as the Congress may from time to time ordain and establish" and Article I, Section 8, Clause 9, empowers Congress to "constitute Tribunals inferior to the supreme Court" (emphasis added).<sup>25</sup> These provisions may prevent Congress from creating Article III judges at large, wholly unconnected with any Article III tribunal at all. But they do not bar the establishment of Article III judges who are not assigned to a particular Article III court but are available for service on a number of such courts. Under 28 U.S.C. 293 and 294 (the assignment provisions), the judges of the Court of Customs and Patent Appeals and of the Court of Claims (including retired judges) are now available to sit on the courts of appeals and district courts throughout the country. By making them Article III judges, Congress acted in the same way as if it had created a number of new Article III judges but had left their assignment to the Chief Justice as need might be shown. It is not a constitutional requirement that an Article III judge be assigned to a particular court from the moment of his taking office.

<sup>25</sup> A "tribunal" or "inferior court" can consist of a single judge. *United States v. Duell*, 172 U.S. 576, 589.

So long as he is available to serve on some established Article III tribunal, the Constitution is satisfied.

**IV. THE COURT OF CUSTOMS AND PATENT APPEALS WAS VALIDLY CREATED BY CONGRESS AS, AND HAS ALWAYS BEEN, AN ARTICLE III COURT**

It is also the government's position that the Court of Customs and Patent Appeals, as a court, was created as, and has always been, an Article III court.<sup>26</sup>

<sup>26</sup> The classification of courts of the United States into two categories—"constitutional" courts, consisting of this Court and those "inferior Courts" which Article III, Section 1, of the Constitution authorizes Congress from time to time to ordain and establish, and in which is vested the "judicial Power of the United States", and "legislative" courts, consisting of courts created by Congress pursuant to powers conferred by other articles of the Constitution—had its origin in *American Insurance Co. v. Canter*, 1 Pet. 511, 546 (1828), involving the status and character of territorial courts. The genesis and development of the distinction are discussed in 1 Moore, *Federal Practice* (2d ed., 1960), § 0.4, pp. 53-73; Katz, *Federal Legislative Courts*, 43 Harv. L. Rey. 894 (1930); Watson, *The Concept of the Legislative Court: A Constitutional Fiction*, 10 Geo. Wash. L. Rev. 799 (1942); Note, *The Restrictive Effect of Article Three on the Organization of Federal Courts*, 34 Col. L. Rev. 344 (1934); Note, *The Judicial Power of Federal Tribunals Not Organized Under Article Three*, 34 Col. L. Rev. 746 (1934); Comment, *The Distinction Between Legislative and Constitutional Courts*, 43 Yale L. Journ. 316 (1933); see also *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582. The terminology is somewhat misleading; as has been pointed out (see, e.g., 1 Moore, *op. cit.*, § 0.4[1], pp. 53-54), all federal courts might be characterized as constitutional courts since they are established either by the Constitution itself or by Congress acting under some constitutional grant of power. From another point of view, all federal courts except this Court are "legislative" in the sense that they are the creatures of statute. Constitutional courts are sometimes referred to, more accurately, as "courts established under Article III of

The language and history of the statute creating the court and its subsequent history are persuasive that this is so. And in the 1958 Act Congress meant, we believe, simply to declare what powers it had exercised when it established the court, not to turn a previously legislative tribunal into a constitutional court.

Indeed, the very purpose of the 1958 statute was to negate, so far as possible, this Court's holding in *Ex parte Bakelite Corporation*, 279 U.S. 438 (1929), that the Court of Customs Appeals was a legislative court because Congress had created it under the tariff power conferred by Article I. That decision had been rendered without the benefit of an explicit and authoritative declaration by the body which created the court as to which of its constitutional powers was exercised in bringing the court into being. Had such a declaration been before the Court when it decided the *Bakelite* case, it would, we submit, have reached the contrary result. And this, we think, was the reasoning of Congress in enacting the 1958 Act. (It also seems doubtful whether the Court fully took account in 1929 of the pertinent historical considera-

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the Constitution", or "Article III" courts. We shall, for convenience, usually use the latter term to refer to such courts—even though this term involves a slight ambiguity in that the authority of Congress to create inferior courts is, in addition to being defined in detail in Article III, also one of the enumerated grants of power in Article I, Section 8 (clause 9; Appendix A, *infra*, p. 118). On the occasions when we refer to "Article I" courts, it will be understood that the reference is to the clauses of Section 8 of that article other than clause 9.

tions to which we shall refer (*infra*, pp. 61ff). We discuss the *Bakelite* opinion in detail, *infra*, pp. 85ff).<sup>27</sup>

**A. CONGRESS, BY THE ACT OF AUGUST 25, 1958, DECLARED THE COURT OF CUSTOMS AND PATENT APPEALS TO BE A COURT WHICH HAD BEEN ESTABLISHED UNDER ARTICLE III**

The Act of August 25, 1958, § 1, 72 Stat. 848, amended Section 211 of Title 28 of the United States Code (the Code provision codifying the statute which created the Court of Customs and Patent Appeals) by adding, after the words

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<sup>27</sup> It is pertinent to note that this Court, in holding that the superior courts of the District of Columbia were established under Article III (*O'Donoghue v. United States*, 289 U.S. 516 (1933)), found it necessary to repudiate its *dicta* to the contrary in the *Bakelite* case (279 U.S. at 450, 460), decided four years earlier. It did so, moreover, without the benefit of a congressional statement so declaring, such as now exists with respect to the Court of Customs and Patent Appeals.

In other *dicta* in the *Bakelite* case (279 U.S. at 452-455), the Court expressed the view that the Court of Claims was a legislative court, and in *Williams v. United States*, 289 U.S. 553 (1933), the Court, approving these *dicta*, so held. In *Pope v. United States*, 323 U.S. 1, the government (reversing its position in the *Williams* case) argued, on the basis of its study of the history of the Court of Claims and the decisions of this Court prior to the *Williams* case, that *Williams* had been wrongly decided and should be overruled. See Brief for the United States, No. 26, Oct. Term, 1944, pp. 60-109. The Court, however, found it unnecessary to reach the question, 323 U.S. at 13. Subsequently, in 1953 (see *infra*, pp. 54-58), Congress passed an Act, similar to the 1958 Act, declaring the Court of Claims to be established under Article III. In its brief as intervenor in *Glidden Company v. Zdanok, et al.*, No. 242, this Term (set for argument immediately following this case), the government defends the validity of the 1953 Act.

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals a new sentence, reading:

Such court is hereby declared to be a court established under article III of the Constitution of the United States.<sup>28</sup>

1. The language of the amendment shows that its purpose was, not to *make* the Court of Customs and Patent Appeals an Article III court, but to declare that it *was* such a court. The purpose was not to change the character of the court from a legislative court to one established under Article III, but to declare that it had been from its creation such a court. Congress, in short, formally and authoritatively declared, through an amendment of the organic act creating the court, that in bringing the court into being it had exercised its power under Article III to create inferior federal courts.

2. The legislative history of the measure confirms this purpose.

In 1953 and 1956, Congress enacted with respect to the Court of Claims and the Customs Court the identical legislation which it enacted in 1958 for the Court of Customs and Patent Appeals. Act of July 28, 1953, c. 253, § 1, 67 Stat. 226; Act of July 14, 1956, c. 589, § 1, 70 Stat. 532. The 1953 Act added to Section 171 of Title 28 (establishing the Court of

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<sup>28</sup> Appendix A, *infra*, pp. 119, 121.

Claims) the identical sentence—"Such court is hereby declared to be a court established under article III of the Constitution of the United States"—which the 1958 Act added to Section 211, and the 1956 Act added the same language to Section 251 (providing for the Customs Court). All three statutes must be read *in pari materia*.

The bill which became the 1953 Act was H.R. 1070, 83d Congress. The House Judiciary Committee, in reporting it out, made clear that its purpose was declaratory. H. Rept. 695, 83d Cong., 1st sess., said (p. 2) :

The principal purpose of this bill is to declare the United States Court of Claims to be a court established under article III of the Constitution. Subsequent to a long line of decisions which recognized the Court of Claims as such a constitutional court, the United States Supreme Court held in 1933 that the Court of Claims was not organized under the provisions of article III, but rather was created by Congress as a so-called legislative court in the exercise of its constitutional power under article I to pay the debts of the United States. By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the

Court of Claims whenever such action is considered necessary or expedient. \* \* \*<sup>29</sup>

The House bill was passed by the House without debate. 99 Cong. Rec. 8125-8126.

A companion Senate bill, S. 1349, differed from the House bill in that, instead of adding the statement "Such court is hereby declared to be a court established under article III of the Constitution of the

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<sup>29</sup> In the same vein, the report went on to say (pp. 3-5):

"The first section of the bill declares the Court of Claims to be a court established under article III of the Constitution, i.e., a 'constitutional court.' Need for this declaration arises from the decision of the Supreme Court in 1933 in the case of *Williams v. United States* (289 U.S. 553), which held that the Court of Claims was not one of the inferior courts established by Congress under article III of the Constitution, but rather was created by Congress as a 'legislative court' in the exercise of congressional power, under article I, to pay the debts of the United States. Section 1 of the bill should remove any doubt that the Court of Claims is a constitutional court.

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"It seems certain that Congress, when it established the Court of Claims in 1854 [sic; should read '1855'], intended to create a court under article III. [A discussion of the legislative history of the 1855 Act and the judicial precedents relating to the Court of Claims prior to the *Williams* decision follows.]

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"In the *Williams* litigation the Department of Justice took the position that the Court of Claims was not an article III court. But years subsequent to that decision and after re-study of the question, the Department of Justice filed an extensive brief in *Pope v. United States* (323 U.S. 1 (1944)), taking the position that the *Williams* case was wrong.

"In view of this uncertainty and difference of opinion it would certainly seem proper for the body which created the Court of Claims to declare whether, in the creation of it, Congress intended to exercise article I or article III power."

The contents of the report are set forth more fully in our *Glidden* brief, No. 242, at pp. 27-31.

United States" to Section 171 of Title 28 as a separate sentence, it proposed to amend the section so as to make it read, in a single sentence:

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record *established under article III of the Constitution of the United States and known as the United States Court of Claims.*<sup>30</sup>

When the Senate bill came up for debate, Senator Gore requested that the House bill be substituted for it (for the reason that the Senate bill was susceptible to the interpretation that Congress was creating a new court, whereas the House bill was not). Senator McCarran, the chairman of the Judiciary Committee, which sponsored the legislation, made no objection, and the House bill was passed. 99 Cong. Rec. 8943-8944.

Although some of the language in the Senate report (and a "corrected" report) accompanying the Senate bill (S. Repts. 261 and 275, 83d Cong., 1st sess.) and some of the remarks of Senators Gore and McCarran during their discussion of the two bills on the Senate floor (99 Cong. Rec. 8943-8944) tend to suggest that it was the purpose of the legislation to "make" the Court of Claims an Article III court (as distinguished from declaring it to be such a tribunal), we believe, for the reasons stated in our *Glidden* brief, No. 242, at pp. 31-35, where we discuss

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<sup>30</sup> See S. Rept. 261, 83d Cong., 1st sess., p. 3, on S. 1349. The italicized words were proposed to be added to the section by the Senate bill.

the pertinent statements, that, read in context, they are consistent with the declaratory purpose of the legislation which the House report and the language of the statute itself, as finally enacted, so clearly evidence. We respectfully refer the Court to our *Glidden* brief for the relevant discussion.

The 1956 Act, as we have said, added to Section 251 of Title 28 (relating to the Customs Court) the same sentence which the 1953 Act added to Section 171 (for the Court of Claims). The bill which became the 1956 Act, S. 584, 84th Congress, passed both Houses without debate. 102 Cong. Rec. 7264, 11589. The House committee report on the bill referred to the fact that “[s]imilar legislation” had been enacted in the previous Congress with respect to the Court of Claims, and described the purpose of the bill as “to remove all doubt as to the status of the Customs Court as a court established under article III” and “declare which of the powers Congress was intending to exercise when the court was created.” H. Rept. 2348, 84th Cong., 2d sess., p. 2. The Senate committee report likewise described the purpose of the bill as “to declare the Customs Court to be a constitutional court” (S. Rept. 1827, 84th Cong., 2d sess., p. 1).<sup>31</sup>

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<sup>31</sup> The Senate report also stated, in explaining the purpose of the bill, that “The Customs Court, as it now exists, is a legislative court” (p. 2). A similar statement, made with respect to the Court of Claims, appeared in both the original and the corrected Senate committee reports accompanying S. 1349, 83d Congress. (S. Repts. 261 and 275, 83d Cong., 1st sess., p. 2.) And a like statement, pertaining to the Court of Customs and Patent Appeals, appeared in S. Rept. 2353, 83d Cong., 2d sess., p. 1, on S. 3131 (an earlier bill which would

The immediate legislative history of the 1958 Act further confirms Congress's purpose in amending the Code section establishing the Court of Customs and Patent Appeals. The bill was H.R. 7866, 85th Congress. Both the House and the Senate committee reports referred to the prior actions of Congress in making similar declarations for the Court of Claims and the Customs Court, and stated that (as in the case of the prior Acts) the object of the bill was to remove all doubt as to the status of the Court of Customs and Patent Appeals as a court created pursuant to, and deriving its powers from, Article III of the Constitution. H. Rept. 2349, 85th Cong., 2d sess., pp. 2-3; S. Rept. 2309, 85th Cong., 2d sess., pp. 2-3. The explanations by the sponsors of the bill on the floor of the House immediately prior to passage were to the same effect. 104 Cong. Rec. 16094-16095. Representative Keating stated that the bill would "complete \* \* \* the action which Congress initiated in declaring the Customs Court to be a constitutional court" and "remove all doubt as to the status of the Court of Customs and Patent Appeals" by "expressly de-

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have declared the Court of Customs and Patent Appeals to be an Article III court). The contexts in which these statements were made reveal that the committee meant that these courts had been held to be, or were generally considered as, legislative courts. Thus, in S. Rept. 261, 83d Cong., 1st sess., p. 2, immediately following the statement ("The United States Court of Claims, as it now exists, is a legislative court"), the committee explained: "This was decided in the case of *Williams v. United States* (289 U.S. 553)." And, of course, in *Eos parte Bakelite Corporation*, 279 U.S. 438, 457-461, this Court held the Court of Customs and Patent Appeals to be a legislative court, and indicated that the Customs Court was likewise such a court.

clar[ing] that court to be 'a court established under Article III of the Constitution of the United States'". 104 Cong. Rec. 16095. Representative Celler explained that the bill would make "no change in the structure, organization, or jurisdiction of the court." *Ibid.* Similarly, on the Senate floor, Senator Talmadge, on behalf of the Chairman of the Judiciary Committee, explained that the "precedent for this proposed legislation" was "a similar provision relating to the customs court" enacted by the previous Congress. 104 Cong. Rec. 17549.<sup>32</sup>

#### B. THE COURT OF CUSTOMS AND PATENT APPEALS WAS IN FACT CREATED BY CONGRESS AS AN ARTICLE III COURT

We now review the history of the Court of Customs and Patent Appeals to show that Congress in fact established it under Article III. *Infra*, pp. 61-85.

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<sup>32</sup> It is true that Senator Talmadge referred to the Customs Court as having been "made" a constitutional court by the 1956 Act, and he referred to "the change of the Court of Customs and Patent Appeals from a legislative court to a constitutional court" which the pending bill would bring about. 104 Cong. Rec. 17549. But since the 1956 Act was, as we have seen, intended merely to declare the Customs Court to be a constitutional court, and since Senator Talmadge explained that the bill under discussion would merely accomplish with respect to the Court of Customs and Patent Appeals what the 1956 Act had accomplished with respect to the Customs Court, the Senator's reference to the bill as one which would "change" the Court of Customs and Patent Appeals from a legislative court to a constitutional one was merely an imprecise use of language. Compare the remark of Representative Keating, in the same statement in which he said that the bill before the House would merely "remove all doubt as to the status of the Court of Customs and Patent Appeals" (see the text, *supra*), that the court "should be established as" an Article III court. 104 Cong. Rec. 16095.

We then attempt to demonstrate that *Ex parte Bakelite Corporation*, 279 U.S. 438, in which this Court decided to the contrary, reached an erroneous conclusion, and further argue that any doubt should be resolved, in the light of the formal and authoritative 1958 declaration by the court's creator, in favor of the court's genesis under Article III. *Infra*, pp. 85-96. Finally, we contend that there is no constitutional obstacle to giving effect to Congress's intention. *Infra*, pp. 96-113.

*1. The court's history shows that Congress established it pursuant to Article III*

*(a) The creation and history of the court*

*i. The Court of Customs and Patent Appeals—originally the Court of Customs Appeals—was created by the Payne-Aldrich Tariff Act of August 5, 1909 (c. 6, § 28, 36 Stat. 11, 91, 105-108), to review the customs decisions of the Board of General Appraisers (now the Customs Court). The 1909 Act added to the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, a new section, 29, which read in part as follows (1st and 2d pars., 36 Stat. 105; Appendix A, *infra*, pp. 121-123):*

A United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President, by and with the advice and consent of the Senate, each of whom shall receive a salary of ten thousand dollars per annum.<sup>33</sup> It shall be a court of record, with

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<sup>33</sup> See *infra*, pp. 72-74.

jurisdiction as hereinafter established and limited.

Said court shall prescribe the form and style of its seal and the form of its writs and other process and procedure and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable.

\* \* \* The court shall appoint a clerk, \* \* \* who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. \* \* \* The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided*, That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States. The court shall have power to establish all rules and regulations for the conduct of the business of the court and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law.

\* \* \*

The similarities between the above language and that of the Act which established the circuit courts of appeals, indisputably Article III courts, are sufficiently striking to invite comparison. Section 2 of the latter Act (Act of March 3, 1891, c. 517, 26 Stat. 826-827) provided in part:

There is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court [sic] with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. \* \* \* The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court.

The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

The presiding judge of the newly created Court of Customs Appeals was to be so designated in the commission issued him by the President, the associate judges were to have precedence according to the dates of their commissions, a quorum was to consist of any three judges, and the concurrence of three judges was to be necessary to any decision. § 29, 4th par., 36 Stat. 105; Appendix A, *infra*, p. 123. A court reporter and the publication of the court's decisions were provided for. § 29, 15th par., 36 Stat. 107-108; Appendix A, *infra*, pp. 127-128.

ii. In the event of one or two vacancies on the court, or the temporary inability or disqualification of one or two judges, the President was authorized, upon request of the presiding judge, to designate any qualified United States circuit or district judge or judges to act. § 29, 12th par., 36 Stat. 107; Appendix A, *infra*, p. 127. Upon the enactment of the Judicial Code of 1911 (see *infra*, pp. 74-75), this provision continued in effect as Section 188 (36 Stat. 1143). It remained in effect until 1948 (see 28 U.S.C. [1946 ed.] 301), when, upon the codification of present Title 28, the power of designation was transferred from the President to the Chief Justice and was broadened and generalized so as to eliminate the limitation of the designating power to the filling of "one or two" vacancies. Section 293 of Title 28, U.S.C., as codified by the Act of June 25, 1948, c. 646, § 1, 62 Stat. 869,

901. The power of designation has since been further broadened. Under present law, all circuit and district judges and all judges of the Court of Claims and the Customs Court are statutorily eligible for service by designation on the Court of Customs and Patent Appeals. 28 U.S.C. 291(b), 292(d), 293(d). See also *infra*, pp. 76-77, 80-81.

iii. As in the case of the Act which first created the district and circuit courts (Judiciary Act of September 24, 1789, c. 20, §§ 2-4, 1 Stat. 73-75) and implemented the clause of Article III, Section 1, of the Constitution, creating this Court, by defining the number of justices who should constitute it and the number needed to constitute a quorum (*id.*, § 1, 1 Stat. 73), no provision applicable to the tenure of the judges was included in the Act creating the Court of Customs Appeals. It was assumed throughout the debates on the bill that the judges of the new court would hold office during good behavior. See, e.g., 44 Cong. Rec. 4185-4225. Thus, Senator McCumber, on behalf of the Committee on Finance (which had reported favorably on the proposal to establish the court), in referring to the need for greater uniformity in the adjudication of customs cases and for a court staffed with judges proficient in knowledge of the technical aspects of this field of law, said (44 Cong. Rec. 4199):

[I]t was thought best to have a court whose whole attention, whose whole life work, should be given to that particular subject.

Similarly, Senator Dolliver, an opponent of the bill, questioned the need for "this new judicial tribunal, with a life term of office" (44 Cong. Rec. 4188), and

referred to the proposed court as "a new court in the United States with lifelong tenure." 44 Cong. Rec. 4187.<sup>34</sup> So far as we are aware, it has never been doubted that the judges of the court have from the beginning held tenure during good behavior.<sup>35</sup>

In 1930, Congress expressly provided—for the first time—that the judges of the Court of Customs and Patent Appeals should hold office during good behavior. Section 646 of the Tariff Act of June 17, 1930, c. 497, 46 Stat. 762. It is evident, however, from what has been said that the purpose of this provision was to make explicit what had previously been understood. Thus, Representative Hawley, in ex-

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<sup>34</sup> Compare Representative Payne's statement during the House debates (44 Cong. Rec. 4697):

"[The circuit courts] do not seem to have given them [customs cases] the consideration which their importance demands. We propose a district court that will have nothing else to do but to give its entire time to these questions, and we propose a salary of \$10,000 a year, so that the President can select them from those standing highest in their profession, great lawyers, who by the dignity of the position and the salary that is attached to it and the location of the court in the city of Washington will be induced to take these places, that they may become trained experts in tariff law, and so that we may have uniformity of decisions."

<sup>35</sup> In *In re Frischer & Co.*, 16 Ct. Cust. App. 191 (1928)—the decision which gave rise to this Court's *Bakelite* decision (see *infra*, pp. 86-90)—the Court of Customs Appeals, nineteen years after its creation, stated that the judges of the court "were commissioned for life" (p. 199), and cited evidence from the legislative history of the organic act showing such to have been the legislative intent (pp. 198-199). This Court, in the *Bakelite* case, did not question the fact of the judges' tenure during good behavior, but held it to be inconclusive as to the court's character as a constitutional or legislative tribunal. 279 U.S. at 459-460.

plaining the purpose of the proposed amendment during the debates in the House, stated that, as a consequence of the then-recent *Bakelite* decision holding the Court of Customs and Patent Appeals to be "a legislative tribunal and not a constitutional court," the members of the court "do not have a term of office unless it was specially provided," and that the amendment would "give them the usual tenure of office during good behavior." 71 Cong. Rec. 2042. And see the comment of Representative Chindblom, immediately following, that "When this court was established it was believed to be a constitutional court [and] that it was not necessary to fix the term." 71 Cong. Rec. 2043. That the purpose was to make explicit what had formerly been assumed would appear to be confirmed by the further provision of Section 646 that: "For the purposes of section 260 of the Judicial Code, as amended, (relating to the resignation and retirement of judges of courts of the United States) any service heretofore rendered by any present or former judge of such court, including service rendered prior to March 2, 1929 [the date as of which its patent jurisdiction was transferred to it and its name was changed to the Court of Customs and Patent Appeals; see *infra*, pp. 77ff, 104ff], shall be considered as having been rendered under an appointment to hold office during good behavior."

iv. The court was given "exclusive appellate jurisdiction" to review—at the instance either of importers of merchandise or the collectors of customs at the several ports—all final decisions of the Board of General Appraisers (the predecessor of the United

States Customs Court),<sup>36</sup> both as to law and fact, in cases respecting the "classification of merchandise and the rate of duty imposed thereon under such classification," the "fees and charges connected therewith," "all appealable questions as to the jurisdiction of" the Board, and "all appealable questions as to the laws and regulations governing the collection of the customs revenues." § 29, 7th par., 36 Stat. 106;<sup>37</sup> Appendix A, *infra*, p. 124. The judgments of the court were made final.<sup>38</sup> *Ibid.*

The jurisdiction thus vested in the new court had previously been exercised by the circuit courts, the

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<sup>36</sup> The Board of General Appraisers was created by Section 12 of the Customs Administration Act of 1890, c. 407, 26 Stat. 131, 136. In 1926, its name was changed to the United States Customs Court, without any accompanying change in its powers, organization, or membership. Act of May 28, 1926, c. 411, 44 Stat. (Part 2) 669. The history of the Board-court is summarized in Appendix B, *infra*, pp. 131-135. As there pointed out, the purpose of the 1926 Act was to make what was a court in fact (and had been repeatedly so held) a court in name as well, to prevent confusion and misunderstanding. In 1956, Congress declared the Customs Court to be a court established under Article III of the Constitution. *Supra*, pp. 54-55, 58. Unlike the judges of the Court of Customs and Patent Appeals, who have enjoyed tenure during good behavior from the time of the court's creation (see *supra*, pp. 65-67), the judges of the Customs Court have possessed unqualified tenure during good behavior only since 1930. Appendix B, *infra*, pp. 132-134. Prior to that time, the President had the power (for stated causes) to remove its members. (From 1908 to 1930 the members of the Board-court held office "during good behavior", but subject to the President's removal power.)

<sup>37</sup> Now (as later amended) 28 U.S.C. 1541.

<sup>38</sup> It was not until 1914, five years after the creation of the Court of Customs Appeals, that this Court was given certiorari jurisdiction to review final judgments of that court. Act of August 22, 1914, c. 267, 38 Stat. 703. See *infra*, pp. 75-76.

circuit courts of appeals, and this Court. Under Section 15 of the Customs Administration Act of 1890 (the Act which created the Board of General Appraisers), appeals lay to the circuit courts from decisions of the Board of General Appraisers in all classification and rate-of-duty cases, with certain limited rights of appeal to this Court. 26 Stat. 138. In the following year, the circuit courts of appeals were created and given general appellate jurisdiction over final decisions of the circuit and district courts (except where direct appeal to this Court was authorized), with certificate and certiorari jurisdiction in this Court. Act of March 3, 1891, c. 517, §§ 5-6, 26 Stat. 826, 827-828.<sup>39</sup> Pursuant to these provisions, from the time of the creation of the Board of General Appraisers in 1890 until the vesting of exclusive appellate jurisdiction over the Board's decisions in the Court of Customs Appeals by the Payne-Aldrich Act of 1909 (*supra*, pp. 61, 67-68), appeals from the Board's decisions were heard by the circuit courts, followed in many instances by further review by the circuit courts of appeals and this Court.<sup>40</sup> The debates in

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<sup>39</sup> See also the Act of May 27, 1908, c. 205, § 2, 35 Stat. 404, amending Section 15 of the Customs Administration Act of 1890, so as to interpose circuit court of appeals review of Board of General Appraisers decisions between review by the circuit courts and review by this Court.

<sup>40</sup> Among the decisions which reached this Court were *United States v. Ballin*, 144 U.S. 1 (1892); *United States v. Jahn*, 155 U.S. 109 (1894); *United States v. Burr*, 159 U.S. 78 (1895); *United States v. Passavant*, 169 U.S. 16 (1898); *United States v. Salambier*, 170 U.S. 621 (1898); *United States v. Lies*, 170 U.S. 628 (1898); *United States v. Ranlett and Stone*, 172 U.S. 133 (1898); *Hoeninghaus v. United States*, 172 U.S. 622 (1899);

Congress, moreover, reflect Congress's full awareness that the jurisdiction which the bill would vest in the new court would be carved from jurisdiction previously exercised by the regular federal courts. See, e.g., 44 Cong. Rec. 4185-4196, 4202, 4220, 4697-4698.<sup>41</sup>

Appeals to "any other court" than the newly estab-

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*American Sugar Refining Co. v. United States*, 181 U.S. 610 (1901); *Lawder v. Stone*, 187 U.S. 281 (1902); *Downs v. United States*, 187 U.S. 496 (1903); *United States v. American Sugar Refining Co.*, 202 U.S. 563 (1906); *Franklin Sugar Co. v. United States*, 202 U.S. 580 (1906); *United States v. G. Falk & Brother*, 204 U.S. 143 (1907); *Goat and Sheepskin Co. v. United States*, 206 U.S. 194 (1907); *Faber v. United States*, 221 U.S. 649 (1911); *Altman & Co. v. United States*, 224 U.S. 583 (1912); see also *Anglo-Californian Bank v. United States*, 175 U.S. 37 (1899).

<sup>41</sup> Illustrative of the tenor of much of the debates was the statement by Senator Dolliver, an opponent of the legislation: "Now, then, the only question left is whether these courts [the Circuit Court for the Southern District of New York, the Circuit Court of Appeals for the Second Circuit, and this Court] are so burdened by this litigation [appeals from the Board of General Appraisers] as to require relief." 44 Cong. Rec. 4187. See also the statistics concerning appeals from the Board of General Appraisers, decided by the Circuit Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit during the year May 1, 1908, through April 30, 1909, which Senator Borah (also an opponent of the bill) inserted in the Congressional Record during the debates. 44 Cong. Rec. 4186. And see the statements of Representative Payne, the sponsor of the measure in the House, criticizing the manner in which appeals from decisions of the Board of General Appraisers were then being handled in the circuit courts and circuit courts of appeals, and expressing the view that channeling all such appeals to a single customs appeals court, as proposed by the bill, would produce desirable uniformity and improve the administration of justice in customs matters. 44 Cong. Rec. 4697, *supra*, p. 66, fn. 34.

lished court from decisions of the Board of General Appraisers were specifically prohibited. § 29 (of the 1890 Act, as amended by the 1909 Act, see *supra*), 6th par., 36 Stat. 106; Appendix A, *infra*, p. 123. A *proviso* to the latter paragraph preserved the jurisdiction of this Court to hear and decide cases already certified to it from circuit courts of appeals and to review by writ of certiorari any case which had already been decided by, or which (being then pending) was thereafter decided by, a circuit court of appeals, provided application for such writ was made within six months following passage of the Act. *Ibid.*; Appendix A, *infra*, pp. 123-124. A further *proviso* stated that all customs cases which had previously been decided by a circuit, district, or territorial court and had not been removed from such court by appeal or writ or error, or which, having been submitted for decision, remained undecided as of the date of the Act's passage, might (*ibid.*; Appendix A, *infra*, p. 124)—

be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment or decree sought to be reviewed.

As a consequence of this latter *proviso* (see also par. 11, Appendix A, *infra*, pp. 126-127, providing for the transfer of cases from the circuit courts of appeals), many of the decisions of the Court of Customs Appeals during the early years of its existence involved cases transferred to that court from the cir-

cuit courts and circuit courts of appeals.<sup>42</sup> Not a few involved appeals from actual decisions of the circuit courts—the Court of Customs Appeals affirming in some instances and in others reversing.<sup>43</sup> For example, the first reported decision of the Court of Customs Appeals was the reversal by that court of a decision of the Circuit Court for the Southern District of New York. *Hansen v. United States*, 1 Ct. Cust. App. 1 (1910).

v. On February 25, 1910, prior to the nomination or confirmation of any of the original judges of the then recently created Court of Customs Appeals,<sup>44</sup> the \$10,000 salary initially fixed for its judges (see *supra*,

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<sup>42</sup> The cases reported at the following pages of volume 1 of the reports of the Court of Customs Appeals (covering the period June 22, 1910–April 24, 1911) were transferred from the circuit courts: 5, 29, 36, 47, 49, 82, 86, 93, 109, 115, 126, 146, 149, 158, 166, 168, 170, 171, 178, 181, 203, 205, 213, 220, 223, 228, 237, 239, 252, 255, 272, 279, 280, 287, 290, 297, 323, 334, 346, 353, 360, 385, 400, 404, 422, 426, 434, 437, 484, 489, 494, 510, 513, 518. For cases transferred from the circuit courts of appeals, see *id.*, pp. 10, 14, 16, 17, 25, 32, 53, 61, 79, 198, 362, 506. For later transferred cases, see, *e.g.*, vol. 2, pp. 1, 4, 9, 11, 43, 78, 89, 101, 116, 162, 181, 186, 189, 234, 237, 239, 249, 275, 278, 332, 336, 355, 512 (May 1, 1911–February 1, 1912).

<sup>43</sup> For decisions of affirmance, see cases reported in volume 1 at pp. 10, 16, 17, 32, 34, 51, 53, 61, 79, 144, 198, 242, 328, 341, 362, and in volume 2 at pp. 43, 101, 162, 234. For decisions of reversal, see vol. 1, pp. 1, 14, 25, 171, 228, 263, 321; vol. 2, p. 249. In *Prosser v. United States*, 1 Ct. Cust. App. 550 (1911), the Court of Customs Appeals affirmed in part and reversed in part a circuit court decision (*United States v. Thomas Prosser & Son*, 177 Fed. 569 (C.C.S.D.N.Y., 1910)).

<sup>44</sup> The five original judges of the court were nominated on March 9, 1910, and confirmed on March 30, 1910. 45 Cong. Rec. 2959, 4003. (Four of these had been first nominated previously, on January 5, 1910, but the nominations were later withdrawn. 45 Cong. Rec. 322, 2205.)

p. 61) was changed to \$7,000. Deficiencies Appropriations Act of February 25, 1910, c. 62, § 1, 36 Stat. 202, 214. The result was to equate the salaries to be paid judges of the Court of Customs Appeals with those then being received by circuit judges.<sup>45</sup> See Act of February 12, 1903, c. 547, 32 Stat. 825. This equivalence continued under the Judicial Code of 1911. See Sections 118, 188, 36 Stat. 1131, 1143. In 1919, Congress increased the salaries of circuit judges from \$7,000 to \$8,500 per year, and in the same Act provided that the judges of the Court of Customs Appeals should receive salaries "equal in amount to" those provided therein for circuit judges, thereby granting the former an equivalent increase. Act of February 25, 1919, c. 29, §§ 2, 5, 40 Stat. 1156, 1157. In subsequent Acts raising judicial salaries, the judges of the Court of Customs Appeals have been treated on a par with circuit judges. Act of December 13, 1926, c. 6, § 1, 44 Stat. (Part 2) 919 (increasing the salaries of both from \$8,500 to \$12,500); Act of July 31, 1946, c. 704, § 1, 60 Stat. 716 (\$12,500 to \$17,500); Act of March 2, 1955, c. 9, § 1 (b), (e), 69 Stat. 9, 10 (\$17,500 to \$25,500).

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<sup>45</sup> Since the salaries were reduced before the court was staffed, there was no violation of the prohibition of Article III, Section 1, against diminishing the compensation of judges appointed under that article during their continuance in office. The reduction thus provides no argument that Congress considered the newly established court to be a non-Article III court. On the contrary, the aligning of the compensation fixed for its judges with that being received by circuit judges would indicate that Congress intended to treat the Court of Customs Appeals as on a par with the circuit courts of appeals, which are indisputably Article III courts.

The salaries established for the judges of the Court of Customs Appeals have always been greater than those fixed for district judges. Even as reduced by the Deficiencies Appropriations Act of 1910 (*supra*, pp. 72-73), the salaries of \$7,000 payable to the judges of the Court of Customs Appeals were \$1,000 higher than those then being received by district judges. See Act of February 12, 1903, c. 547, 32 Stat. 825. The difference in their respective compensations has been widened by later Acts providing for pay increases. Act of December 13, 1926, c. 6, § 1, 44 Stat. (Part 2) 919; Act of March 2, 1955, c. 9, § 1 (c), (e), 69 Stat. 9, 10. The differential is now \$3,000. 28 U.S.C. 135, 213.<sup>46</sup>

*vi.* When the Judicial Code was enacted in 1911 (Act of March 3, 1911, c. 231, 36 Stat. 1087), the provisions pertaining to the establishment, powers, and jurisdiction of the Court of Customs Appeals were transferred to the Code (with amendments not here pertinent) and codified as Chapter Eight, §§ 188-199, 36 Stat. 1143-1146) together with the provisions relating to the district courts (Chapters One through Five), the circuit courts of appeals (Chapter Six), the Court of Claims<sup>47</sup> (Chapter Seven), the former

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<sup>46</sup> We answer at pp. 83-85, *infra*, petitioner's argument (Br. 47-48, 72), based on the Legislative Appropriations Act of 1932, that Congress at that time considered the Court of Customs and Patent Appeals to be a non-Article III tribunal. As we there point out, petitioner is incorrect in stating (Br. 48, 72) that the Act itself cut the salaries of the judges of that court.

<sup>47</sup> As to the status of the Court of Claims, see our brief in *Glidden Company v. Zdanok, et al*, No. 242, this Term.

Commerce Court<sup>48</sup> (Chapter Nine), and this Court (Chapter Ten). 36 Stat. 1087–1143, 1146–1160.

vii. In 1914, this Court, for the first time, was given limited certiorari jurisdiction to review cases from the Court of Customs Appeals. Act of August 22, 1914, c. 267, 38 Stat. 703. The Act gave this Court power to review final judgments of that court in cases in which construction of the Constitution or of a treaty was drawn in issue; in addition, the Court was authorized to hear and decide any case pending in the Court of Customs Appeals if the Attorney General, before judgment, should certify that the case was of such importance as to make review by this Court expedient. *Ibid.* In 1930, the limitations on the Court's jurisdiction created by the 1914 Act were eliminated (Tariff Act of June 17, 1930, c. 497, § 647, 46 Stat. 762), as a consequence of which the Court has since had general certiorari jurisdiction with respect to customs cases from the Court of Customs Appeals. See 28 U.S.C. 1256. Pursuant to the power thus

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<sup>48</sup> The Commerce Court, created by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539, and abolished three years later by the Act of October 22, 1913, c. 32, § 1, 38 Stat. 208, 219, was certainly an Article III court. See Frankfurter and Landis, *The Business of the Supreme Court* (1928), pp. 168–169; Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 912 (fn. 84), 915–916 (1930); *Hallowell v. Commons*, 210 Fed. 793, 798 (C.A. 8). The Act creating the court provided that it should be composed of five judges, to be from time to time designated and assigned thereto by the Chief Justice for five-year periods from among the circuit judges, except that initially it was to be composed of five additional circuit judges to be appointed by the President (for service during good behavior). The periods of service on the Commerce Court of the five new judges were to be for one, two, three, four, and five years,

granted, this Court has heard and determined many cases on certiorari to that court.<sup>49</sup>

viii. On September 14, 1922, the judges of the Court of Customs Appeals were made eligible, on designation of the Chief Justice of the United States, for service on the Court of Appeals and Supreme Court (now District Court) of the District of Columbia. Act of September 14, 1922, c. 306, § 5, 42 Stat. 839.<sup>50</sup> The latter courts were and are Article III courts. *O'Donoghue v. United States*, 289 U.S. 516 (rejecting *dictum* to the contrary, see p. 550, in *Ex parte Bakelite Corporation*, 279 U.S. 438, 460). This provision remained in effect until 1958, when t

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respectively, in order that the period of designation of one of the new judges should expire in each year thereafter, and so as to permit a system of rotation of assignments of circuit judges to the new court. 36 Stat. 540. The Act abolishing the court provided that nothing in the Act should be "deemed to affect the tenure of" any of the judges then acting as circuit judges by appointment under the Act which created the court. Those judges were to "continue to act under assignment \* \* \* as judges of the district courts and circuit courts of appeals," but on their deaths, resignations, or removals from office their offices were to abolished and no successors appointed. 38 Stat. 219.

<sup>49</sup> See *Five Per Cent. Discount Cases*, 243 U.S. 97; *Nicholas & Co. v. United States*, 249 U.S. 34; *Vitelli & Son v. United States*, 250 U.S. 355; *United States v. Aetna Explosives Co.*, 256 U.S. 402; *United States v. Rice & Co.*, 257 U.S. 536; *United States v. Fish*, 268 U.S. 607; *United States v. Stone & Downer Co.*, 274 U.S. 225; *Hampton & Co. v. United States*, 276 U.S. 394; *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294; *Board of Trustees of the University of Illinois v. United States*, 289 U.S. 48; *United States v. Bush & Co.*, 310 U.S. 371; *Barr v. United States*, 324 U.S. 83.

<sup>50</sup> See *supra*, pp. 4-5, 40; opinion below at R. 40-41; and concurring opinion of Judge Prettyman (R. 43-49).

was broadened to include service on any court of appeals or district court.<sup>51</sup> Judges of the Court of Customs and Patent Appeals are now eligible by statute for service on any court of appeals, any district court, the Court of Claims, and the Customs Court. 28 U.S.C. 293(a), 293(c).

ix. On September 21, 1922, the jurisdiction of the Court of Customs Appeals was enlarged to include appeals, on questions of law only, from findings of the United States Tariff Commission in proceedings relating to unfair practices in the import trade. Tariff Act of September 21, 1922, c. 356, § 316(c), 42 Stat. 858, 943.<sup>52</sup> It is this aspect of its jurisdiction that was involved in *Ex parte Bakelite Corporation*, 279 U.S. 438, see *infra*, pp. 85ff.

x. In 1929, the patent and trade-mark jurisdiction of the Court of Appeals of the District of Columbia was transferred to the Court of Customs Appeals and the name of the court was changed to the Court of Customs and Patent Appeals. Act of March 2, 1929, c. 488, §§ 1, 2, 45 Stat. 1475.

The patent jurisdiction of the District of Columbia Court of Appeals transferred by this Act rested on Rev. Stats. 4909, 4911-4914, as amended (35 U.S.C., Compact Ed. [1928 Supp. to 1926 ed.] 57, 59a-62). Under these provisions, if an applicant for a patent was dissatisfied with the decision of the "board of appeals" in the Patent Office (consisting of the Patent Commissioner and certain other Patent Office offi-

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<sup>51</sup> 28 U.S.C. (1926, 1934, 1940 eds.) 22; 28 U.S.C (1946 ed.) 22(a); 28 U.S.C. (1952 ed.) 291(b); Act of August 25, 1958, § 4, 72 Stat. 848.

<sup>52</sup> Now 28 U.S.C. 1543; 19 U.S.C. 1337(c).

cials), he could appeal to the Court of Appeals of the District of Columbia, which was authorized to revise the decision of the board on the basis of the evidence produced in the Patent Office. The court thereafter returned to the commissioner a certificate of its proceedings and its decision, which "govern[ed] the further proceedings in the case." The court's decision did not preclude any interested person from contesting the validity of the patent (if one was granted) in any court wherein it might be called in question. The court's trade-mark jurisdiction was based on Section 9 of the Act of February 20, 1905, c. 592, 33 Stat. 727 (15 U.S.C., Compact Ed., 89), providing that an applicant for the registration or cancellation of a trade-mark (or a party to an interference as to a trade-mark, or one opposing the registration of a trade-mark), if dissatisfied with the decision of the Patent Commissioner, could appeal to the Court of Appeals of the District of Columbia under the same rules of practice and procedure, so far as applicable, as governed in the case of patent appeals. In *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, the patent and trade-mark jurisdiction of the District of Columbia Court of Appeals was held to be administrative rather than judicial in nature (see *infra*, pp. 104-109). The patent and trade-mark jurisdiction of the Court of Customs and Patent Appeals now rests on 28 U.S.C. 1542.

xi. Finally, to complete the history, in 1958 (as has been noted) Congress amended 28 U.S.C. 211 (the Code successor to the original creating Act) so as officially to declare the court to be one established

under Article III of the Constitution. Act of August 25, 1958, § 1, 72 Stat. 848 (Appendix A, *infra*, p. 121); *supra*, pp. 53ff.

The currently applicable provisions pertaining to the constitution, jurisdiction, and procedure of the court are contained in 28 U.S.C. 211-216, 1541-1543, 2601-2602.

(b) *The congressional purpose to establish the court as an Article III tribunal*

The conclusion to be drawn from the foregoing survey is, we submit, that it was the congressional purpose, in creating the Court of Customs Appeals, to establish an Article III tribunal. Like the Commerce Court and the Emergency Court of Appeals, the tribunal was to be one with limited subject-matter jurisdiction but general geographical jurisdiction—the converse, in this respect, of the regular federal courts, whose jurisdiction over subject matter is general, but whose geographical jurisdiction is limited.

i. *The court's subject matter.*—The subject matter committed to the new court was federal and judicial in nature. Customs cases arise under the Constitution, federal laws, or treaties, and therefore fall within the judicial power granted by Article III, Section 2, of the Constitution. And there can be no doubt at all that, on the creation of the court in 1909, its duties were wholly judicial. See *supra*, pp. 61-77; *infra*, pp. 96-102.<sup>50</sup>

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We show below, at pp. 102ff, that it was not until 1922 that the court was given duties which might be considered non-judicial, and that these additional functions did not change the character of the court.

*ii. The parallel between the language creating the Court of Customs Appeals and that creating the circuit courts of appeals.*—The striking parallelism of language between the statute which created the Court of Customs Appeals and that under which the circuit courts of appeals were formed eighteen years earlier (*supra*, pp. 61-64) indicates that the same source of constitutional authority was invoked by Congress on each occasion. Since the source of power in the case of the circuit courts of appeals was indisputably Article III, there is a clear inference that Article III was also the source of the power Congress exercised in establishing the Court of Customs Appeals.

*iii. The eligibility of circuit and district judges to sit on the Court of Customs Appeals.*—From the beginning, Congress authorized the President, in the event of one or two vacancies on the court, or the temporary inability or disqualification of one or two judges, to designate any qualified circuit or district judge or judges temporarily to fill the vacancy or vacancies or to act in place of the judge or judges so disabled or disqualified. The same provision was continued under the Judicial Code of 1911 and remained in effect until 1948, when the power of designation was transferred to the Chief Justice and broadened so as to eliminate the limitation of the power of designation to the filling of "one or two" vacancies. It has since been further broadened, so that now all circuit and district judges as well as judges of the Court of Claims and the Customs Court are statutorily eligible for service by designation on the Court of Customs and Patent Appeals. *Supra*,

pp. 64–65. This history affords another striking indication of Congress's understanding that it was creating an Article III court when it established the Court of Customs Appeals.

iv. *The tenure of the judges.*—We have pointed out the virtually conclusive proof that Congress intended the judges of the court to have life tenure, and the fact that they have actually enjoyed such tenure (see *supra*, pp. 65–67). Since the organic act was silent with respect to tenure, the inference is that Congress understood that tenure during good behavior attached to the offices automatically, by the command of Article III, Section 1, of the Constitution. As remarked by the Court of Customs Appeals itself in *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 199 (1928) :

From what source, may we inquire, were the judges of this court given tenure during good behavior? There can be but one answer. Being an inferior court, created under section 1 of Article III of the Constitution, and, as such, exercising a portion of the judicial powers of the United States, said section, by its express terms, authorized said judges to "hold their offices during good behavior."

Cf. *McAllister v. United States*, 141 U.S. 174, 184–186. A student of the field (Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 909 (1930)) has expressed the view that the absence of a provision as to tenure in the organic act creating the Court of Customs Appeals—

would seem an almost conclusive indication that Congress assumed that the provisions of Article III of the Constitution would apply to the

court and would control the tenure of the judges.

"One may therefore infer," the author concluded, "that Congress believed itself to be acting pursuant to Article III in creating the court." *Ibid.*

For these reasons, petitioner's reliance on the fact that Congress provided for the first time in 1930 that the judges of the Court of Customs and Patent Appeals should hold office during good behavior (Br. 46-47) is misplaced. As we have pointed out (*supra*, pp. 66-67), the purpose of this provision was only to make explicit what had previously been understood. Because this Court, in the *Bakelite* decision decided in the previous year, had held the Court of Customs and Patent Appeals to be a non-Article III tribunal (contrary to Congress's intent and previous assumption), and because, if it was a legislative court, its judges did not possess tenure during good behavior as a matter of course, Congress deemed it advisable that such tenure be expressly provided by statute, in order to make explicit its previous understanding. The provision had no other significance.

v. *The carving out of the court's jurisdiction from the jurisdiction of the regular federal courts.*—Another relevant factor is that the jurisdiction vested in the Court of Customs Appeals was carved from jurisdiction previously exercised by the regular federal courts—the circuit courts, circuit courts of appeals and this Court (*supra*, pp. 67-72). See *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 198. Not only was the new court to exercise exclusive appellate jurisdiction in a class of cases which the regular federal courts

had previously heard; in addition, provision was made for the transfer to the new court of cases pending in the circuit courts and circuit courts of appeals on the effective date of the new court's creation, including cases which had been decided by the circuit courts. Thus, the view that Congress established the Court of Customs Appeals as a mere legislative court requires the surprising conclusion that a non-Article III court—pursuant to a statutory scheme specifically authorized by Congress—sat on many occasions during its early years as an appellate tribunal reviewing judgments of Article III courts.

*vi. Congress's treatment of the judges of the Court of Customs Appeals as on a par with circuit judges in matters of salary.*—The fact that from the beginning Congress has treated the judges of the Court of Customs Appeals as on a par with circuit judges in matters relating to compensation (*supra*, pp. 72-74) similarly shows its conception of the Court of Customs Appeals and the circuit courts of appeals as equivalent in dignity, and indirectly reflects its understanding of the Article III origin and status of the court. See *O'Donoghue v. United States*, 289 U.S. 516, 549.

Petitioner errs in his reliance on the Legislative Appropriations Act of June 30, 1932, c. 314, 47 Stat. 382, as showing that Congress at that time considered the Court of Customs and Patent Appeals to be a non-Article III tribunal (Br. 47-48, 72). By Section 107(a)(5) of that Act (47 Stat. 402), Congress provided that, for the fiscal year ending June 30, 1933, the salaries of all judges "except judges whose compensation may not, under the Constitution, be dimin-

ished during their continuance in office" should be at the rate of \$10,000 per annum if they were then at a rate exceeding that amount. As noted by petitioner, the judges of the Court of Customs and Patent Appeals voluntarily accepted a reduction in salary from \$12,500 to \$10,000 pursuant to this provision and—pursuant to a special provision authorizing the Treasury to accept from persons whose salaries were constitutionally immune to reduction such part of their pay as would otherwise not be paid them (§ 109, 47 Stat. 403)—specifically waived any constitutional exemption they might have had (Br. 47-48, n. 25). The action of the judges in so doing is, of course, understandable in the light of this Court's then recent decision in *Ex parte Bakelite Corporation*, 279 U.S. 438 (1929), holding the court to be a legislative court, whose judges did not enjoy the protection afforded by Article III. The statutory provision itself, however, did not evidence any congressional understanding whether the judges of the Court of Customs and Patent Appeals would be subject to the reduction in compensation. It was general in language, mentioning no court by name. Petitioner's statement that Congress, in 1932, "[cut] the salaries of [the] judges of the Court of Customs and Patent Appeals" (Br. 48, 72) is thus inaccurate. Since the Act referred to no court by name, it is altogether without significance on the issue of the kind of court Congress intended to establish when it created the Court of Customs Appeals. Moreover, since the judges voluntarily waived any claim of exemption they might have had,

their action did not involve even an acknowledgment on their part that they were subject to the Act.

vii. *The eligibility, since 1922, of judges of the Court of Customs Appeals to sit on the superior courts of the District of Columbia.*—Since 1922, the judges of the Court of Customs Appeals have been eligible by statute, on designation of the Chief Justice of the United States, for service on the Court of Appeals and Supreme Court (now District Court) of the District of Columbia, both of which are Article III courts (*O'Donoghue v. United States*, 289 U.S. 516). *Supra*, p. 76. This eligibility was broadened in 1958 to include service on any court of appeals or district court. *Supra*, pp. 76-77.

2. *The decision in EX PARTE BAKELITE CORPORATION, 279 U.S. 438, should be reexamined and held no longer effective*

In *Ex parte Bakelite Corporation*, 279 U.S. 438, this Court held in 1929 that the Court of Customs Appeals was a legislative court, created by Congress under its Article I power to lay and collect duties on imports (Art. I, Section 8, Cl. 1; Appendix A, *infra*, p. 118), and deriving none of its authority from Article III. We believe that this decision reached an erroneous conclusion on the basis of mistaken premises and failed adequately to take into account the historical materials we have summarized. For these reasons, and in the light of the intervening authoritative declaration by Congress that it established the court under Article III, we submit that the *Bakelite* decision should be reexamined and held to be no longer effective.

(a). The *Bakelite* case arose under the Court of Customs Appeals' jurisdiction (first given it in 1922) to hear appeals on questions of law from findings of the Tariff Commission in proceedings under Section 316 of the Tariff Act of 1922,<sup>54</sup> relating to unfair practices in the import trade. At issue was whether such an appeal involved a justiciable case or controversy within Article III, Section 2, of the Constitution, which in turn was thought to depend on whether the decision was binding on, or merely advisory to, the President. Pursuant to the provisions of Section 316 (see 279 U.S. at 446-447),<sup>55</sup>

<sup>54</sup> Act of September 21, 1922, c. 356, 42 Stat. 858, 943; now, as amended, 19 U.S.C. 1337. The court's jurisdiction derived from subsection (c) of Section 316 (19 U.S.C. 1337(c)). See also 28 U.S.C. 1543.

<sup>55</sup> Briefly, they provided that the President, whenever the existence of unfair methods of competition or unfair acts in the import trade were established to his satisfaction, might affix additional duties on the offending imports or, in extreme cases, exclude them from entry altogether, the President's decision to be "conclusive" (§ 316 (a), (e), 42 Stat. 943-944). "[T]o assist the President", the Tariff Commission was to investigate allegations of unfair practice, conduct hearings, receive evidence, and make findings and recommendations to the President, the findings to be "conclusive" if "supported by evidence", but subject to appeal by the importer to the Court of Customs Appeals, if adverse, on "questions of law only" (§ 316 (b), (c)). The judgment of the Court of Customs Appeals was to be "final", subject to review by this Court on certiorari (§ 316(c)). The "final findings" of the Tariff Commission (as revised, if necessary, as a consequence of any appeal that might be taken) were to be "transmitted with the record to the President" for his consideration and action (§ 316(d)).

This Court's certiorari jurisdiction over this class of case was repealed by the Tariff Act of 1930. Act of June 17, 1930,

the Bakelite Corporation, a domestic manufacturer, invoked the investigative jurisdiction of the Tariff Commission as against competing importers. The Tariff Commission made findings favorable to Bakelite and recommended that the President exclude from entry the competing products of the importers. The importers appealed to the Court of Customs Appeals. The Bakelite Corporation, by motion to dismiss, challenged the jurisdiction of the court on the ground that no case or controversy within Article III, Section 2, was involved, and that the court, as an inferior court established under Article III, had jurisdiction only of such cases and controversies. The Court of Customs Appeals upheld its jurisdiction and denied the motion to dismiss. *In re Frischer & Co.*, 16 Ct. Cust. App. 191. Although “[b]oth sides to the controversy” conceded the court’s Article III status (16

c. 497, § 337(c), 46 Stat. 590, 703 (19 U.S.C. 1337(c)). The Senate Finance Committee’s report on the bill which became the 1930 Act indicated that the reason for eliminating this Court’s reviewing authority was that the President was not bound by any decision of the courts in the matter; that, as a result of this lack of finality, no “case or controversy” within Article III was presented in the appellate proceedings under the section; and that Congress could not constitutionally give this Court jurisdiction over such proceedings. The committee stated further that the provision for review by the Court of Customs and Patent Appeals was being retained because that court, “being a ‘legislative’ court and not a ‘constitutional’ court,” might receive this “jurisdiction of a proceeding the judgment in which is merely advisory to discretionary action by the President.” This Court’s *Bakelite* decision, which had been decided approximately four months prior to the date of the committee report, was, among others, cited by the committee for these views. S. Rept. 37, 71st Cong., 1st sess., p. 67, on H.R. 2667.

Ct. Cust. App. at 196), the court considered the question at length and held that it had been established under Article III. *Id.*, pp. 196-203. Rejecting, however, the contention that the appeal did not involve a case or controversy within Article III, Section 2, the court sustained its jurisdiction. *Id.*, pp. 203-214.

In this Court, the case began with a petition by the Bakelite Corporation for an original writ of prohibition forbidding the Court of Customs Appeals to entertain the appeal, on the ground that no case or controversy was presented. All parties in this Court—the Bakelite Corporation, the Solicitor General (on behalf of the Court of Customs Appeals), and the importers (intervening by special leave of Court)—were in agreement that the Court of Customs Appeals was an inferior court established under Article III.<sup>56</sup>

This Court found it unnecessary to reach the merits—whether the appeal to the Court of Customs Appeals involved a case or controversy within Ar-

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<sup>56</sup> No. 17, Original, Oct. Term, 1928: Motion and Petition for Writ of Prohibition, pp. 21-22; Supplemental Brief on behalf of the Bakelite Corporation, Petitioner, on the Subject of the Constitutional Character of the United States Court of Customs Appeals, pp. 3-28; Brief of Solicitor General on behalf of the United States Court of Customs Appeals, pp. 32-38; Petition and Brief on behalf of Frischer & Co., Inc., et al., for Leave to Intervene, p. 12. The Bakelite Corporation argued the matter at considerable length. See Supplemental Brief, *supra*, filed by leave of Court granted January 14, 1929. The brief of the Solicitor General argued the point at considerable but lesser length. The brief of the intervening importers merely acknowledged that all parties to the proceeding conceded the Article III status of the Court of Customs Appeals (p. 12).

ticle III—because, it held, the court was not a tribunal established under Article III but a legislative court, “created by Congress in virtue of its power to lay and collect duties on imports.” 279 U.S. at 458. The rationale is contained in the following passages of the opinion (279 U.S. at 458, 459) :

The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings. [Footnotes omitted.]

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\* \* \* [The argument as to the tenure of the judges] mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.

The basic premises of the *Bakelite* opinion, in short, were, *first*, that a court in which Congress vests jurisdiction it is not required to place in any court is necessarily a legislative tribunal which cannot be established under Article III, and, *second*, that Congress created the Court of Customs Appeals under Article I, not Article III. In our view, both of these interrelated assumptions were mistaken.

(b). There is no principle requiring Congress to vest in the Article III courts only those matters "which inherently or necessarily require judicial determination", and prohibiting it from requiring Article III judicial determination of matters capable of administrative settlement. On the contrary, there are many areas in which Congress can choose to provide either a judicial remedy or an administrative procedure. This was made clear, over a century ago, in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272. The question in that case was the validity of a distress warrant, issued by the solicitor of the Treasury Department against the property of a collector of customs to satisfy a balance owing to the United States arising from a shortage in the collector's accounts. The plaintiff, who challenged the validity of the warrant, contended that its issuance constituted an exercise of the judicial power of the

United States and hence was void because not the act of a court ordained and established by Congress under Article III. 18 How. at 275. This Court agreed that "if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void," because "the officers who performed these acts could exercise no part of that judicial power." *Ibid.* The Court held, however, that the actions of the executive officers did not constitute the exercise of judicial power, yet were consistent with due process of law, because Congress, under its plenary power over the customs revenues, had authority to enforce the Treasury's rights against defalcating collectors through exclusively executive processes. P. 281. The Court "d[id] not doubt the power of congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted" (*ibid.*), but held that provision for such judicial action was not constitutionally required. The Court then said (18 How. at 284) :

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. *At the same time there are matters, involving public rights, which may be presented in such*

*form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.* \* \* \* [Emphasis added.]<sup>57</sup>

See, to the same effect, *Fong Yue Ting v. United States*, 149 U.S. 698, 715, where this language was quoted in sustaining a statute providing for the judicial deportation of aliens found unlawfully within the country, the Court pointing out that Congress could have committed the subject entirely to executive officers (pp. 713-714, 728).

The practice of many decades gives firm support to this principle. As we have pointed out (*supra*, pp. 67ff, 82-83), prior to the establishment of the Court of Customs Appeals, the jurisdiction vested in that court had been exercised by the regular federal courts—following a period of executive determination. A substantial part of the present business of the federal district courts consists of matters which Congress could clearly commit to executive or administrative determination but has chosen to bring “within the cognizance of the courts of the United States”, e.g., money, contract, and tort claims against the government. Conversely, a number of present-day administrative tribunals carry on functions which could be, and have in the past been, vested in Article III courts. In some instances, too, the courts and admin-

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<sup>57</sup> The “courts of the United States” referred to in the quoted passage, and throughout the opinion, were the regular federal courts, and it was assumed that those courts would be exercising their normal Article III powers.

istrative agencies now have concurrent or coordinate jurisdiction. For example, both the Federal Trade Commission and the courts (at the instance of the Department of Justice) enforce certain provisions of the Clayton Act.<sup>58</sup> In sum, the history of the federal courts and of federal agencies disproves the fundamental postulate on which the *Bakelite* opinion rests.

In addition, the jurisprudence of this Court gives no support—aside from the two cases following on the heels of *Bakelite* (*Williams v. United States*, 289 U.S. 553, and *O'Donoghue v. United States*, 289 U.S. 516)—to that primary premise that only legislative courts can “examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.”<sup>59</sup> 279 U.S. at 451. None of the decisions cited to sustain this part of the *Bakelite* opinion suggests that proposition. In most of the cases, the tribunals involved, or about which the opinions spoke, were the regular federal courts, whose Article III status was and is unquestioned.<sup>60</sup> No attempt was made in the *Bakelite* opinion to reconcile

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<sup>58</sup> See, also, e.g., *Far East Conference v. United States*, 342 U.S. 570; *Maritime Board v. Isbrandtsen*, 356 U.S. 481; *Maryland and Virginia Milk Producers Assoc., Inc. v. United States*, 362 U.S. 458; *United States v. Radio Corp. of America*, 358 U.S. 334.

<sup>59</sup> See *Murray's Lessec v. Hoboken Land and Improvement Co.*, 18 How. 272, 275, 280–285; *Grisar v. McDowell*, 6 Wall. 363, 379; *Auffmordt v. Hedden*, 137 U.S. 310, 329; *In re Fassett*, 142 U.S. 479, 486–487; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659–660; *Passavant v. United States*, 148 U.S. 214, 218–219; *Fong Yue Ting v. United States*, 149 U.S. 698, 714–715, 727–732.

its holding with these earlier decisions, which assumed the Article III status of those courts to which were submitted various matters not *requiring* judicial determination (though susceptible of it). And in the most recent case on legislative tribunals, *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, each of the four opinions (expressing various views) rejected, explicitly or implicitly, the notion that Article III courts are barred from considering matters not "inherently or necessarily" *requiring* "judicial determination".

(c). The second major premise of the *Bakelite* opinion—that Congress created the Court of Customs Appeals under Article I, not under Article III—is equally untenable. We have just shown that the susceptibility of customs claims to executive determination did not bar Congress from placing the decision of these cases in an Article III court. The history we have detailed above at pp. 61–85, shows that Congress thought and assumed, when it established the Court of Customs Appeals, that it was creating a special inferior court under Article III.<sup>60</sup> The creation of such a special Article III court to exercise a particular type of jurisdiction is not at all foreign

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<sup>60</sup> The *Bakelite* opinion states that whether a court is legislative or constitutional does not depend upon "the intention of Congress" (279 U.S. at 459), but this means only that Congress's characterization of a court as *legislative or constitutional* is not controlling. This Court did not say that it was irrelevant what *power* Congress considered itself to be exercising. On the contrary, the same sentence of the *Bakelite* opinion declares that "the true test lies in the *power under which the court was created and in the jurisdiction conferred*" (emphasis added).

to our history,<sup>61</sup> nor is it prohibited by the Constitution (see *Lockerty v. Phillips*, 319 U.S. 182, 187-188). Finally, we show below, at pp. 96ff, that no constitutional obstacle prevented Congress from acting under Article III; the original jurisdiction of the court is plainly within the "judicial power" granted by Article III, and its later-acquired jurisdiction did not divest it of Article III status.

(d). Our analysis of the *Bakelite* holding and rationale has thus far taken no account of the 1958 declaration by Congress that the Court of Customs and Patent Appeals was in fact established under Article III of the Constitution. See *supra*, pp. 53ff. Implicit in that declaration was the view of Congress that this Court, in *Ex parte Bakelite*, had misread the congressional purpose in establishing the court, and had erroneously characterized it as legislative. Whatever doubt might remain as to the soundness or unsoundness of the *Bakelite* decision, apart from the 1958 declaration, ought now to be resolved, we submit,

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<sup>61</sup> Cf. the former Commerce Court, created by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539, and abolished by the Act of October 22, 1913, c. 32, § 1, 38 Stat. 208, 219 (orders of the Interstate Commerce Commission), and the former Emergency Court of Appeals, created by Section 204 (c) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 31, 32 (50 U.S.C. App. 924(c)) (orders and price schedules of the former Office of Price Administration). The Commerce Court was a constitutional court. See *supra*, pp. 75-76, fn. 48. The Emergency Court of Appeals which consisted of three or more district or circuit judges designated by the Chief Justice, was likewise a constitutional court. *Lockerty v. Phillips*, 319 U.S. 182, 187-188. In our view, the Court of Claims and Customs Court are also Article III courts. See our brief in the *Glidden* case, No. 242, and Appendix B, *infra*, pp. 131-135.

in favor of the correctness of the congressional conclusion—*i.e.*, that *Bakelite* mistakenly construed the effect and intent of Congress's action in establishing the court. It needs no argument that this Court should accord great weight to a formal declaration by Congress, as the creator of a judicial tribunal, proclaiming which of its powers it exercised in bringing the tribunal into being. Particularly should this be so where the relevant history points directly to the conclusion that Congress actually created the Court of Customs and Patent Appeals in an exercise of its Article III authority—just as, in 1958, it said it did.

C. THERE IS NO CONSTITUTIONAL OBSTACLE TO THE CONCLUSION THAT THE COURT OF CUSTOMS AND PATENT APPEALS WAS VALIDLY ESTABLISHED BY CONGRESS UNDER ARTICLE III

1. *The customs jurisdiction of the court has always been purely judicial in character, involving cases arising under the Constitution, laws, and treaties of the United States, and controversies to which the United States is a party*

(a). “*Cases*” and “*controversies*.”—The sole jurisdiction of the Court of Customs Appeals at the time of its creation in 1909, and during the first thirteen years of its existence, was the hearing of appeals (both as to law and fact), at the instance of importers or of the customs collectors, from final decisions of the Board of General Appraisers (now the United States Customs Court) in classification and rate-of-duty cases arising under the customs laws of the United States, including questions relating to fees and charges and to the jurisdiction of the Board, and

"all appealable questions as to the laws and regulations governing the collection of the customs revenues." Section 29, 7th par., of the Customs Administration Act of 1890, c. 407, 26 Stat. 131, as amended by the Payne-Aldrich Tariff Act of 1909, c. 6, § 28, 36 Stat. 11, 91, 106; Appendix A, *infra*, p. 124. See *supra*, pp. 61, 67-72, 79, 82-83.<sup>62</sup> Its judgments in all such cases were, and are ~~not~~<sup>final</sup>. *Ibid.*; 28 U.S.C. 2601. Its customs decisions, thus, were and have always been beyond revision by either Congress or the Executive. Indeed, as we have noted (*supra*, pp. 75-76), they were not even reviewable by this Court during the first five years of the lower court's existence.

Thus, there can be no doubt that the jurisdiction of the Court of Customs Appeals, from the time of its establishment in 1909 until the enactment of the Tariff Act of 1922 (see *supra*, pp. 77, 86ff), consisted exclusively of "cases", within the meaning of Article III, Section 2 of the Constitution. *Hayburn's Case*, 2 Dall. 409; *Osborn v. Bank of the United States*, 9 Wheat. 738, 819; *United States v. Ferreira*, 13 How. 40, 46-50; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 284; *Gordon v. United States*, 117 U.S. 697; *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 487; *Muskrat v. United States*, 219 U.S. 346; *Tutun v. United States*, 270 U.S. 568, 576-577. As observed by the Court of Customs Appeals itself in *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 198 (1928):

<sup>62</sup> Of course, the court still retains this jurisdiction (28 U.S.C. 1541), to which other powers have since been added. 28 U.S.C. 1542, 1543.

[I]n the creation and establishment of this court no jurisdiction was given to it except in "cases." In its original creation it was not within the contemplation of its creators to confer upon it jurisdiction to try administrative questions or matters not embraced within the terms of section 2 of Article III. Every case given to it *arises* under "the laws of the United States." \* \* \* [Emphasis in the original.]

That the court's exclusive initial jurisdiction extended to "cases" in the constitutional sense is further shown by the fact that this jurisdiction was carved from authority previously exercised by the regular federal courts (*supra*, pp. 67-72, 82-83) and that this Court has on many occasions, since it was first given the power to do so in 1914, reviewed customs judgments of the Court of Customs Appeals on writ of certiorari. See cases cited *supra*, p. 76, fn. 49. That this Court has granted review in these cases confirms their judicial character, since the Court has always refused to hear, on the ground that it lacks the power to do so, matters which did not present a "case" or "controversy" within the scope of Article III. See cases cited *supra*, p. 97; also, *Keller v. Potomac Electric Co.*, 261 U.S. 428, 440-444; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 698-701.

(b). "*Arising under this Constitution, the Laws of the United States, and Treaties*".—There can also be no doubt that the "cases" with which the court deals in its customs jurisdiction arise "under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Author-

ity"—within the terms of Article III, Section 2. The various customs statutes and regulations, as well as the foreign treaties bearing on customs problems—the substantive law applied by the court—are exclusively federal. The *Bakelite* opinion did not intimate any other view, and the rationale of the opinions in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, confirms it (see, e.g., 337 U.S. at 610, 611-615, 641-2 (fn. 20-21), 643, 649, 652).

(c). "*Controversies to which the United States shall be a Party*".—The cases within the original jurisdiction of the Court of Customs Appeals also fall under a second of the categories of cases and controversies defined in the second section of Article III, *viz.*, "Controversies to which the United States shall be a Party." See Brown, *The Rent in Our Judicial Armor*, 10 Geo. Wash. L. Rev. 127, 136 (1941). In the proceedings before the Board of General Appraisers, the United States was the party defendant.<sup>63</sup> In the Court of Customs Appeals, the United States was appellant or appellee, depending on which way the decision of the Board of General Appraisers went.

In *Williams v. United States*, 289 U.S. 553, 571-580, this Court construed the phrase "Controversies to which the United States shall be a Party" as embracing only controversies to which the United States is a party *plaintiff*. (In so doing, it found it necessary to overrule prior statements that, though the United

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<sup>63</sup> Its consent to be sued was given by the Customs Administration Act of 1890, c. 407, § 14, 26 Stat. 131, 137; and see the same section of that Act as amended by the Payne-Aldrich Act of 1909, c. 6, § 28, 36 Stat. 11, 91, 100; see also Appendix B, *infra*, pp. 131-132.

States could "not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy." *Minnesota v. Hitchcock*, 185 U.S. 373, 386; see also *Kansas v. United States*, 204 U.S. 331, 342.) In *Pope v. United States*, 323 U.S. 1, the government urged that the interpretation placed upon the constitutional phrase by the *Williams* case was the consequence of "faulty analysis and the failure of the Court to have the pertinent constitutional history before it." Brief for the United States, No. 26, Oct. Term, 1944, p. 87. The historical materials bearing upon the intent of the framers were examined in detail. *Id.*, pp. 86-101.<sup>64</sup> We adhere to that position in the *Glidden* case, No. 242, and summarize it immediately below. For the full-scale argument, the Court is respectfully referred to our *Glidden* brief, at pp. 75-91.

The conclusion of the *Williams* case, concededly contrary to the literal meaning of the constitutional language ("Controversies to which the United States shall be a Party"), was based upon an historical analysis designed to show that the immunity of the sovereign from suit precluded the application of the phrase to suits *against* the government. More complete historical research has shown no intention to withhold from the federal courts jurisdiction over claims against the government. The flaw in the reasoning in the *Williams* case is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. The premise that

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<sup>64</sup> The Court found it unnecessary to reach the question. 323 U.S. at 13.

Article III is not a consent to suit is correct; but it does not follow that, where such consent has been given, a suit against the government is not a "Controvers[y] to which the United States shall be a Party." While sovereign immunity was well known at the time of the framing of the Constitution, it was equally known that such immunity could be, and had been, waived both in England and here. Virginia, Delaware, Maryland, Georgia, North Carolina, Connecticut, and New Jersey had all submitted to judicial determination controversies involving the government. Hamilton, in *The Federalist*, No. 81, specifically recognized that a sovereign may be sued if it consents. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 324. Moreover, it is significant that, in the Virginia debates on the Constitution, both Madison and Marshall expressly acknowledged that, if a state consents to be sued by a foreign nation, Article III would authorize jurisdiction in the federal courts over such a suit, by virtue of the clause in Section 2 extending the federal judicial power to controversies "between a State \* \* \* and foreign States \* \* \*". See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-324. There is no reason to believe that the parallel clause providing jurisdiction where the United States is a party had a narrower scope. The framers would not have granted the federal courts jurisdiction of suits against sovereign states (if they consented to be sued) but at the same time deprived the federal courts of jurisdiction against the United States (if it con-

sented to be sued).<sup>65</sup> And the historical fact is that, less than five years after the adoption of the Constitution, the Justices of this Court assumed that the inferior courts of the United States could act on claims against the government if the judicial action was made final and placed beyond executive or legislative revision (*Hayburn's Case*, 2 Dall. 409; see *United States v. Ferreira*, 13 How. 40).

*2. The subsequent vesting in the court of jurisdiction over other matters did not affect its Article III status*

(a). It was not until 1922, thirteen years after its creation, that the Court of Customs Appeals was first vested with jurisdiction over a matter which may not have involved the adjudication of a case or controversy within the scope of Article III, Section 2. This was the power, conferred by Section 316 of the Tariff Act of 1922, 42 Stat. 943, to hear appeals from findings of the Tariff Commission (on questions of law only) in proceedings relating to unfair practices in the import trade. *Supra*, pp. 77, 86-90. Whether such an appeal presented a case or controversy was the issue on the merits in the *Bakelite* case, 279 U.S. 438, which this Court found it unnecessary to determine in view of its ruling that the Court of Customs Appeals was a legislative tribunal and, as such, could

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<sup>65</sup> The scope and meaning of the clause extending federal judicial power to "Controversies to which the United States shall be a Party" is discussed to some extent in the opinions of Mr. Chief Justice Vinson and Mr. Justice Rutledge in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 610, 640-642 (fns. 20-21).

lawfully be vested with power to hear matters other than cases or controversies. *Supra*, pp. 86ff. The Court of Customs Appeals, it will be recalled, had determined that such an appeal *did* present a case or controversy. *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 203-214 (1928); see *supra*, pp. 87-88.<sup>66</sup>

Regardless, however, of whether these appeals from the Tariff Commission present justiciable cases within the sense of Article III,<sup>67</sup> the conferring of such jurisdiction could not have affected the Article III character and status of the court if, as we have argued, it had that status previously. If the court was created as an Article III tribunal, the attempted vesting by Congress of inconsistent powers could not have altered its character. At most, the attempt to grant such authority would have been ineffectual, as the petitioner in *Ex parte Bakelite* had argued to this Court (*supra*, pp. 86-88). See *Pope v. United States*, 323 U.S. 1, 13. But for the reasons discussed below,

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<sup>66</sup> See, however, fn. 55, *supra*, pp. 86-87, 2d par., where it is noted that the Senate Finance Committee, in 1929, was of the view that an appeal from the Tariff Commission's findings did not present a case or controversy.

<sup>67</sup> This aspect of the court's jurisdiction has constituted a very minor part of its total business. See Brown, *The Rent in Our Judicial Armor*, 10 Geo. Wash. L. Rev. 127, 135 (1941). Only five such cases have been before the court in its history: *In re Frischer & Co.*, 16 Ct. Cust. App. 191 (1928) (see also *Frischer & Co. v. United States*, 17 C.C.P.A. 494 (1930) (the same case, on the merits, following the *Bakelite* decision)); *In re Orion Co.*, 22 C.C.P.A. 149, 71 F. 2d 458 (1934); *In re Northern Pigment Co.*, 22 C.C.P.A. 166, 71 F. 2d 447 (1934); *In re Amtorg Corp.*, 22 C.C.P.A. 558, 75 F. 2d 826 (1935); *In re Von Clemm*, 43 C.C.P.A. (Customs) 56, 229 F. 2d 441 (1955).

at pp. 109-113, we do not believe that the vesting of this additional jurisdiction—even assuming its non-justiciable character—was inconsistent with the court's Article III status.

(b). In 1929, the patent and trade-mark jurisdiction of the Court of Appeals of the District of Columbia was transferred to the Court of Customs Appeals and the name of the court was changed to the Court of Customs and Patent Appeals. *Supra*, pp. 77-79. This category constitutes the second of the two major classes of jurisdiction currently exercised by the court.

In *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, decided two years prior to this transfer, this Court held that the patent and trade-mark powers of the District of Columbia Court of Appeals involved the rendering of “mere administrative decision[s]”—in the nature of “instruction[s] to the Commissioner of Patents”—by “a court which is made part of the machinery of the Patent Office for administrative purposes,” with the consequence that the court’s decisions were not “judicial judgments” within the meaning of Article III, Section 2. 272 U.S. at 698-699. “Neither the opinion nor decision of the Court of Appeals under § 4914 R.S. [patents], or § 9 of the Act of 1905 [Act of February 20, 1905, c. 592, 33 Stat. 727, assimilating the rules governing trade-mark appeals to those obtaining in patent appeals],” the Court said (272 U.S. at 699)—

precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be

called in question. This result prevents an appeal to this Court, which can only review judicial judgments. \* \* \*<sup>68</sup>

The Court did not mention in the *Postum Cereal* opinion an earlier decision, *United States v. Duell*, 172 U.S. 576, 586-589 (decided at a time when the legislation with respect to patent and trade-mark appeals differed in no material respect from that in effect at the time of the *Postum Cereal* ruling<sup>69</sup>), in which Chief Justice Fuller, for a unanimous Court, stressed the essentially judicial nature of the process of issuing patents and settling controversies in patent interference proceedings and the binding effect of the Court of Appeals' decision on the Patent Office in such proceedings.<sup>70</sup> In particular, the *Duell* opinion

<sup>68</sup> The Court did not question the power of the District of Columbia Court of Appeals to hear such cases, but stated that it derived its authority in this respect from Article I of the Constitution rather than Article III. 272 U.S. at 700. The opinion referred to the power of Congress under Article I, Section 8, clause 17 (giving Congress the exclusive authority to govern the District of Columbia) to clothe the courts of the District with administrative and legislative as well as judicial functions. See *supra*, pp. 39ff; *infra*, pp. 109ff.

<sup>69</sup> The provision of Rev. Stats. § 4914<sup>71</sup> declaring that no decision of the court in a patent appeal case would preclude any person from the right to contest the validity of any patent that might be issued as a consequence of such appeal in any court in which the same might be called in question—referred to by the Court in the *Postum Cereal* case (*supra*, pp. 104-105)—was in effect at the time of the *Duell* decision, and was referred to in a passage of an earlier opinion (*Butterworth v. Hoe*, 112 U.S. 50, 60) which the *Duell* opinion quoted. 172 U.S. at 587.

<sup>70</sup> See Rev. Stats. § 4914, providing that the decision of the court "shall govern the further proceedings in the case." This provision was in effect when the *Postum Cereal* case was decided, and is still the law. 35 U.S.C. 144.

noted that the court's decision was "none the less a judgment" because its effect was to aid an administrative body in the performance of duties imposed upon it by Congress. 172 U.S. at 588. See also the later patent law decision in *Hoover Company v. Coe*, 325 U.S. 79; and such rulings as *Perkins v. Elg*, 307 U.S. 325, and *McGrath v. Kristensen*, 340 U.S. 162 (cases in which courts have given rulings on legal issues, binding on administrative officials but not necessarily controlling their ultimate action). Since the *Postum Cereal* decision, the law has come clearly to recognize that courts perform a judicial function when they declare particular legal rights or find the facts, even though the executive or administrative agency with operative authority is not required to grant or deny the final relief sought. Cf. the federal extradition procedure under which the judge certifies his conclusions to the Secretary of State but the latter is not bound to extradite as a result of the judicial certification. 18 U.S.C. 3184, 3186.

In addition, it should be noted that, under the law in effect at the time of the *Postum Cereal* decision, if an application for a patent was refused, either by the Commissioner of Patents or by the Court of Appeals of the District of Columbia upon appeal from the commissioner, the applicant might seek to have his right to a patent adjudicated by a bill in equity. Rev. Stats., § 4915 (35 U.S.C. [1926 ed.] 63). Two months following the *Postum Cereal* decision, the law was amended so as to compel an unsuccessful applicant in the Patent Office to elect between his right of appeal to the District of Columbia Court of Appeals and his

remedy in equity. Act of March 2, 1927, c. 273, § 8, 44 Stat. (Part 2) 1336 (35 U.S.C., Compact Ed. [1928 Supp. to 1926 ed.], 59a). If a party to a patent interference proceeding was dissatisfied with the decision of the Patent Office board of appeals and appealed to the District Court of Appeals, an adverse party might, under the amendment, notify the Commissioner of Patents that he elected to have all further proceedings conducted under Rev. Stats. § 4915, in which event the appeal to the Court of Appeals was to be dismissed. *Ibid.*<sup>11</sup> The provisions were in effect at the time of the transfer of the patent and trade-mark jurisdiction to the Court of Customs Appeals, and remain in effect at the present time. 35 U.S.C. 141, 145, 146.

Moreover, the fact that the decision of the District of Columbia Court of Appeals did not preclude any interested person from contesting the validity of the patent or trade-mark (if one was granted) in any court in which it might be called in question—the rea-

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<sup>11</sup> The Senate Committee on Patents, in reporting out the bill effecting these amendments, explained that, under then-existing law, "an applicant whose case has been rejected or a losing party in an interference may appeal to the Court of Appeals of the District of Columbia and then if he is dissatisfied he may start proceedings *de novo* by filing a bill in equity in a United States district court, under section 4915 [of the Revised Statutes], and from the decision of that court he may appeal to the court of appeals. This procedure makes for very vexatious delays and the object of the present bill is to permit one to have the decision of the Patent Office reviewed either by the court of appeals or by filing a bill in equity, but not both." S. Rept. 1313, 69th Cong., 2d sess., p. 4, to accompany S. 4812. See also, to the same effect, H. Rept. 1889, 69th Cong., 2d sess., pp. 2-3, to accompany H.R. 13487, a similar bill.

son assigned in the *Postum Cereal* opinion for the non-judicial character of the Court of Appeals' decision—would not appear to be a sound basis for that conclusion. The right to contest the validity of a patent or trade-mark existed even if the patent or trade-mark was issued pursuant to the procedure by bill in equity, which Rev. Stats. § 4915 (35 U.S.C. [1926 ed.] 63; now 35 U.S.C. 145) made available to an unsuccessful applicant as an alternative to his remedy by appeal to the District Court of Appeals (see *supra*, pp. 106-107). See Reviser's Note to 35 U.S.C. 144. The latter section is the modern counterpart of Rev. Stats. § 4914, the provision of the former law which contained the "non-preclusion" clause. That clause has been omitted from 35 U.S.C. 144 "as superfluous" because, the Reviser's Note explains, "such a sentence does not appear in the present civil action [the present name for the former remedy by bill in equity] section, 35 U.S.C. 63 [now 35 U.S.C. 145] and in either case the validity of the patent may be questioned." Since the remedy by bill in equity was unquestionably judicial (see *Hoover Co. v. Coe*, 325 U.S. 79), notwithstanding that a patent issued under that procedure might later be challenged in any court, the mere fact that a patent issued pursuant to the alternative procedure of appeal to the Court of Appeals could later be challenged would not appear to constitute a basis, in itself, for holding the appeal procedure non-judicial. Cf. *Hoover Co. v. Coe*, *supra*.

In short, there is no longer a sound basis to accept the reasoning of the *Postum Cereal* opinion that patent and trade-mark decisions of the Court of Cus-

Customs and Patent Appeals are administrative rather than judicial.

(c). Even if one does accept the *Postum Cereal* decision as having settled the non-Article III character of the patent and trade-mark jurisdiction of the Court of Customs and Patent Appeals, the transfer to it of that jurisdiction was not inconsistent with its Article III status.

*O'Donoghue v. United States*, 289 U.S. 516, indicates that the possession by a federal court of some powers and functions not strictly judicial in character is compatible with its status as a tribunal ordained and established under Article III. 289 U.S. at 545-548, 550-551. The *O'Donoghue* case held that the superior courts of the District of Columbia were established by Congress pursuant to its court-creating authority under Article III, with the consequence that the judges of those courts enjoy the immunity guaranteed by that article against diminution of their compensation during their continuance in office. 289 U.S. at 551. At the same time, the Court recognized the authority of Congress, acting under its plenary power to legislate for the District of Columbia (Art. I, § 8, clause 17), to vest in the courts of the District, in addition to their Article III judicial functions, administrative and even legislative powers,<sup>72</sup> which could

<sup>72</sup> See, e.g., *Keller v. Potomac Electric Co.*, 261 U.S. 428, 440-443 (review of rate making); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 698-701 (patent and trademark appeals); *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 467-468 (review of radio station licensing; cf. *Federal Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 274-278); see also 31 D.C. Code 101 (authorizing Dis-

not have had their source in Article III. 289 U.S. at 545-548, 550-551.

We submit that the rationale of the *O'Donoghue* case is also applicable to the Court of Customs and Patent Appeals with respect to its patent and trade-mark jurisdiction.<sup>73</sup> For one thing, that court, like the courts of the District, is located at the seat of government, within the area over which Congress possesses exclusive power to legislate. Congress can, pursuant to the same authority which it exercises in conferring non-judicial powers on the ordinary courts of the District, constitutionally vest similar powers in the Court of Customs and Patent Appeals, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept, since the patent and trade-mark jurisdiction did actually come from the Court of Appeals for the District (*supra*, pp. 77-78, 104-109). There would appear to be no constitutional objection to carving out part of the accepted jurisdiction of the District Court of Appeals and assigning it to another such constitutional court. Congress has limited neither the judicial nor the non-judicial functions of the District Court of Appeals to local matters related to the District, and this Court has never intimated that the non-judicial functions of that court must be confined to District

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District Court judges to appoint members of the Board of Education).

<sup>73</sup> It would also be applicable—assuming the non-judicial character of the court's appellate function in proceedings before the Tariff Commission relating to unfair competitive practices (see *supra*, pp. 77, 86ff, 102-104)—to that phase of its jurisdiction.

matters. The radio station, for example, whose licensing was involved in *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (see note 72, *supra*, pp. 109-110), was located in Schenectady, New York. The authority of Article I, Section 8, clause 17, has been held sufficient basis for imposing general federal functions, non-judicial in character, on the Court of Appeals. It should suffice, too, for another appellate court within the District. It is true that the Court of Customs and Patent Appeals is national in scope and not limited by statute to sitting in Washington (28 U.S.C. 214), although the District is the official station of the judges (28 U.S.C. 456). But the congressional power relating to the District of Columbia is also national in scope and may be exercised beyond the confines of the District. See *Cohens v. Virginia*, 6 Wheat. 264, 424, 425, 428-9; *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 600-602 (opinion of Jackson, J.).

Furthermore, we suggest that Congress may properly draw upon its other Article I powers in adding certain non-judicial functions to the Court of Customs and Patent Appeals. The patent, commerce, and customs duties clauses of Article I, Section 8 (clauses 8, 3, and 1; Appendix A, *infra*, p. 118)—granting authority to legislate generally in the field of patents, trade-marks, and customs—sustain the establishment of such non-judicial machinery. The problem is, of course, the joinder of these functions with the court's judicial responsibilities stemming from Article III. In the past, this Court and individual Justices have rejected, in general terms, the

exercise by federal constitutional courts, other than the District of Columbia courts, of non-judicial functions. See, e.g., *Ex parte Bakelite*, 279 U.S. 438, 454; *O'Donoghue v. United States*, 289 U.S. 516, 546-7, 551; *Williams v. United States*, 289 U.S. 553, 569; *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582. Theoretically it is difficult to distinguish, in this connection, the District of Columbia power in Article I, Section 8, from the other heads of legislative authority in Article I. But this Court's concern for the nationwide federal court system prompts the thought that there well may be a difference, with respect to joinder of non-judicial functions, between this Court and the regular federal courts in the states, on the one hand, and special constitutional courts established for special purposes, on the other. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment<sup>74</sup>—mainly the fear of unloosing upon those courts a mass of duties foreign to their role as judges—apply with less force to the specialized tribunals with their limited functions and areas of responsibility (particularly the specialized courts determining issues between citizens and their government).

The analogy of the District of Columbia courts indicates that, so long as these specialized courts are primarily endowed with judicial power under Article III, the addition of certain non-judicial functions is valid and does not destroy the Article III character of the court. Many so-called "administrative" func-

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<sup>74</sup> See, e.g., *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590-1, 616, 628-9, 648-9.

tions, like the patent and trade-mark duties of the Court of Customs and Patent Appeals, are close kin to normal judicial responsibilities (see *supra*, pp. 104-109)—separated by, at most, a thin line. See, especially, *Hoover Co. v. Coe*, 325 U.S. 79, 83-84, 87-88. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both Article III powers and decision-making non-judicial functions of this kind, but must instead create a totally separate body for the non-judicial or non-Article III responsibilities. Properly applied, the principle of the separation of powers does not compel that result.<sup>75</sup>

<sup>75</sup> There is some authority for the proposition that even judges of the regular federal courts may act non-judicially in a voluntary capacity analogous to that of a commissioner. In *Hayburn's Case*, 2 Dall. 409, the three circuit courts expressed their opinion that the determinations which Congress had asked them to make of pension claims against the government, subject to review by the Secretary of War, did not involve the judicial power of the United States which they were capable of exercising. The Circuit Court for the District of New York, consisting of Chief Justice Jay, Associate Justice Cushing, and District Judge Duane, was of the opinion, however, that the individual judges of the circuit court were capable of performing those functions as "commissioners" and not as a court. Subsequently the judges of some district courts did act in such capacity. See *United States v. Ferreira*, 13 How. 40; see also the note concerning the unreported 1794 case of *United States v. Yale Todd*, appended to the report of the *Ferreira* case (p. 51). The judges of the Court of Claims have said that they assume the performance of like advisory functions at the request of Congress, sitting as commissioners and not as a court. See *Sanborn v. United States*, 27 C. Cls. 485, 490, mandamus to permit appeal denied, *In re Sanborn*, 148 U.S. 222. Cf. *Zadeh v. United States*, 124 C. Cls. 650.

V. IF THE COURT OF CUSTOMS AND PATENT APPEALS WAS  
NOT AN ARTICLE III COURT BEFORE 1958, THE ACT OF  
AUGUST 25, 1958, MADE IT ONE

A. If this Court, adhering to its *Bakelite* decision, should disagree with our contention (and the view of Congress, as reflected in its declaration in the Act of August 25, 1958, *supra*) that the Court of Customs and Patent Appeals was created as and has always been an Article III court, we submit that the 1958 Act should be given at least prospective effect, *i.e.*, that the court should be held to have been made an Article III tribunal by that Act. Cf. *Postmaster-General v. Early*, 12 Wheat. 136, 148-149; *United States v. Clafin*, 97 U.S. 546, 548-549. As observed by Chief Justice Marshall in the *Early* case (holding that a statute which purported to vest certain jurisdiction in the district courts "concurrent with" the circuit courts effectually gave the jurisdiction to the circuit courts, though the assumption of the act—that the circuit courts already possessed the power in question—was mistaken) :

It is true, that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law, does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as

a declaratory act, and expresses it in terms capable of conferring the jurisdiction. \* \* \* [12 Wheat. at 148-149]

In the same way, the 1958 Act, "declar[ing]" the Court of Customs and Patent Appeals "to be a court established under article III of the Constitution," is capable of being given at least prospective effect—and should be if such construction is necessary to give effect to the congressional intention to the extent constitutionally possible.

B. There is no valid constitutional objection, we submit, to this construction.

1. The conversion of the court into an Article III court would not require the reappointment and reconfirmation of its judges. Conceivably, if the judges had previously served under tenures for fixed periods or at the pleasure of the President, their reappointment and reconfirmation to positions on what was thenceforth to be an Article III tribunal might have been required. In fact, however, the incumbent judges already had life tenure, and their compensations were fixed by law. In these circumstances, the Constitution did not require their renomination by the President and reconfirmation by the Senate. By making the court an Article III court, Congress merely gave up *its* theoretical power to shorten the judges' tenure and cut their salaries. Though this change sufficed to make the court an Article III court and its judges Article III judges, it cannot be said, we think, to have interfered in any realistic sense with the President's nominating power—any more than, for example, a statutory increase in the salaries or emoluments of

the judges would have done so. Congress, as we have previously suggested (*supra*, pp. 48-49), has often made more significant changes in the tenure or compensation of existing officials without encroaching upon the executive appointment power. "It cannot be doubted," as this Court said in *Shoemaker v. United States*, 147 U.S. 282, 301, "\* \* \* that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." The same conclusion should follow in the present context. In the absence of a clear congressional purpose to abolish the old offices and create new ones, a change of the type involved here did not constitutionally require new appointments and confirmations. Certainly neither Congress nor the President thought so.

2. If it be assumed for argument that the transition of the court from "legislative" to "constitutional" status could not validly be effected without giving the President the right to reappoint the incumbent judges or to make new appointments, and the Senate the right to approve or reject the nominations, we submit that the rights were waived. At least, so far as is known, no question was ever raised in regard to the matter. The 1958 Act was passed by the Senate and signed by the President with knowledge that the incumbent judges, under the plan of the statute, were to continue in office under their existing life appointments.

3. The fact that the 1958 Act contemplated no change in the jurisdiction and functions of the court is not an argument against construing the Act as

changing the court's character from "legislative" to Article III status. From what has been said (*supra*, pp. 96-102), there can be no doubt, we think, that the already existing jurisdiction of the court on the customs side of its docket met all the requirements of "cases" and "controversies" as defined in Article III. And whatever may be the precise nature of its patent and trade-mark jurisdiction (see *supra*, pp. 104-113), it is at least clear that the line which separates it from the traditional kinds of "cases" and "controversies" cognizable under Article III is a fine one indeed (*supra*, pp. 104-109). Cf. Note, *The Constitutional Status of the Court of Claims*, 68 Harv. L. Rev. 527, 534, n. 43 (1955). For the reasons we have detailed (*supra*, pp. 109-113), the possession by the court of this category of jurisdiction is not inconsistent with Article III status.

#### **CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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## APPENDIX A

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

#### I. *Constitutional Provisions*

##### 1. Article I, Section 8, of the United States Constitution:

The Congress shall have Power [Clause 1]  
To lay and collect Taxes, Duties, Imposts and  
Excises \* \* \*;

\* \* \* \* \*

[Clause 3] To regulate Commerce with foreign Nations, and among the several States  
\* \* \*;  
\* \* \* \* \*

[Clause 8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[Clause 9] To constitute Tribunals inferior to the supreme Court;

\* \* \* \* \*

[Clause 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States \* \* \*; — And

[Clause 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers \* \* \*.

##### 2. Article III of the United States Constitution:

SECTION 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress

may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— \* \* \* to Controversies to which the United States shall be a Party; \* \* \*.

\* \* \* \* \*

## II. Statutes

1. 28 U.S.C. 211 (as amended by Section 1 of the Act of August 25, 1958, 72 Stat. 848; see *infra*, p. 121) :

### § 211. Appointment and number of judges.

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

2. 28 U.S.C. 293(a) :

### § 293. Judges of other courts.

(a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any

circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

3. 28 U.S.C. 294:

§ 294. *Assignment of retired Justices or judges to active duty.*

(a) Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake:

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated

and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

(e) No retired justice or judge shall perform judicial duties except when designated and assigned.

**4. The Act of August 25, 1958, § 1, 72 Stat. 848:**

Section 211 of title 28 of the United States Code is amended by inserting after the first sentence thereof a new sentence as follows: "Such court is hereby declared to be a court established under article III of the Constitution of the United States."

**5. The Payne-Aldrich Tariff Act of August 5, 1909, c. 6, § 28, 36 Stat. 11, 91, 105–108, amended the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, and added a new section, 29, which provided (36 Stat. 105–108) :**

SEC. 29. That a United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President, by and with the advice and consent of the Senate, each of whom shall receive a salary of ten thousand dollars per annum. It shall be a court of record, with jurisdiction as herein-after established and limited.

[2d par.] Said court shall prescribe the form and style of its seal and the form of its writs and other process and procedure and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal at a salary of three thousand dollars per annum, to be appointed by and hold office during the pleasure of said court; said services outside the District of Columbia to be performed by the United States marshals in and for the districts where sessions of said court may be held, and to this end said marshals shall be the marshals of said Court of Customs Appeals. The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be four thousand dollars per annum, which sum shall be in full payment for all service rendered by such clerk, and all fees of any kind whatever, and all costs shall be by him turned into the United States Treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided*, That the costs and fees so fixed shall not, with respect to any item,

exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States. The court shall have power to establish all rules and regulations for the conduct of the business of the court and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law.

[3d par.] The said Court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held by the said court, in the several judicial circuits, and at such places as said court may from time to time designate.

[4th par.] The presiding judge of said court shall be so designated in [the] order of appointment and in the commission issued him by the President, and the associate judges shall have precedence according to the date of their commissions. Any three of the members of said court shall constitute a quorum, and the concurrence of three members of said court shall be necessary to any decision thereof.

[5th par.] The said court shall organize and open for the transaction of business in the city of Washington, District of Columbia, within ninety days after the judges, or a majority of them, shall have qualified.

[6th par.] After the organization of said court no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this Act: *Provided*, That nothing in this Act shall

be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after the passage of this Act: *And provided further,* That all customs cases heretofore decided by a circuit or district court of the United States or a court of a Territory of the United States and which have not been removed from said courts by appeal or writ of error, and all such cases heretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment or decree sought to be reviewed.

[7th par.] The Court of Customs Appeals established by this Act shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this Act, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgment or decrees of said Court of Customs Appeals shall be final in all such cases.

[8th par.] Any judge who, in pursuance of the provisions of this Act, shall attend a session

of the Court of Customs Appeals held at any place other than the city of Washington, District of Columbia, shall be paid, upon his written and itemized certificate, by the marshal of the district in which the court shall be held, his actual and necessary expenses incurred for travel and attendance, and the actual and necessary expenses of one stenographic clerk who may accompany him, and such payments shall be allowed the marshal in the statement of his accounts with the United States.

[9th par.] The marshal of said court for the District of Columbia and the marshals of the several districts in which said Court of Customs Appeals may be held shall, under the direction of the Attorney-General of the United States and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: *Provided, however,* That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts; and in no case shall said marshals secure other rooms than those regularly occupied by existing circuit courts of appeals, circuit courts, or district courts, or other public officers, except where such can not, by reason of actual occupancy or use, be occupied or used by said Court of Customs Appeals.

[10th par.] If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of

duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: *Provided*, That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of, and a copy of said statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination.

[11th par.] Immediately upon the organization of the Court of Customs Appeals all cases within the jurisdiction of that court pending and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial or district courts, shall, with the record and samples therein, be certified by said courts to said Court of Customs Appeals for further proceedings in accordance herewith: *Provided*. That where orders for the taking of further testimony before a referee have been made in any of such

cases, the taking of such testimony shall be completed before such certification.

[12th par.] That in case of a vacancy or the temporary inability or disqualification for any reason of one or two judges of said Court of Customs Appeals, the President of the United States, may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place, and such United States judge or judges shall be duly qualified to so act.

[13th par.] Said Court of Customs Appeals shall have power to review any decision or matter within its jurisdiction and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

[14th par.] Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days.

[15th par.] In addition to the clerk of said court the court may appoint an assistant clerk at a salary of two thousand five hundred dollars per annum, five stenographic clerks at a salary of two thousand four hundred dollars per annum each, and one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of nine hundred dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the pleasure of and perform such duties as are assigned them by the court. Said reporter shall prepare and transmit to the Secretary of the Treasury once a week in time for publication in the Treasury Decisions copies of all

decisions rendered to that date by said court, and prepare and transmit, under the direction of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the Secretary of the Treasury shall direct. The marshal of said court for the District of Columbia is hereby authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery as may be necessary for the use of said court, and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge.

#### 6. Sections 1601-1608 of Title 16 of the District of Columbia Code:

##### CHAPTER 16.—**QUO WARRANTO**

###### **§ 16-1601. Against whom issued—Civil action.**

A quo warranto may be issued from the District Court of the United States for the District of Columbia in the name of the United States—

First. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office, civil or military \* \* \*.

\* \* \* \* \*

And said proceedings shall be deemed a civil action.

###### **§ 16-1602. Who may institute—Ex rel. proceedings.**

The Attorney General or the district attorney may institute such proceedings on his own motion, or on the relation of a third person. But such writ shall not be issued on the relation of a third person except by leave of the court, to be applied for by the relator, by a petition duly verified, setting forth the grounds of the appli-

cation, or until the relator shall file a bond with sufficient surety, to be approved by the clerk of the court, in such penalty as the court may prescribe, conditioned for the payment by him of all costs incurred in the prosecution of the writ in case the same shall not be recovered from and paid by the defendant.

*§ 16-1603. Attorney General and district attorney refusing to act—Procedure.*

If the Attorney General and district attorney shall refuse to institute such proceeding on the request of a person interested, such person may apply to the court by verified petition for leave to have said writ issued; and if in the opinion of the court the reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of said interested person, on his compliance with the condition prescribed in section 16-1602 as to security for costs.

*§ 16-1604. Relator claiming office—Petition.*

\* \* \* \* \*

*§ 16-1605. Notice to defendant.*

On the issuing of the writ the court may fix a time within which the defendant may appear and answer the same. \* \* \*

*§ 16-1606. Default—Proceedings.*

If the defendant shall not appear as required by the writ, after being personally served, the court may proceed to hear proof in support of the writ, and render judgment accordingly.

*§ 16-1607. Pleading—Trial by jury.*

The defendant may demur or plead specially or plead "not guilty" as the general issue, and the United States may reply as in other actions of a civil character; and any issue of fact shall be tried by a jury if either party shall require it, otherwise it shall be determined by the court.

§ 16-1608. *Verdict.*

Where the defendant is found by the jury to have usurped or intruded into or unlawfully held or exercised an office or franchise, the verdict shall be that he is guilty of the act or acts in question, and judgment shall be rendered that he be ousted and excluded therefrom and that the relator recover his costs.

## APPENDIX B

### CREATION AND HISTORY OF THE UNITED STATES CUSTOMS COURT (FORMERLY THE BOARD OF GENERAL APPRAISERS)

The Board of General Appraisers, the predecessor of the present United States Customs Court, was created by Section 12 of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, 136. As amended by the Payne-Aldrich Tariff Act of August 5, 1909, c. 6, § 28, 36 Stat. 11, 91, 98-99 (the Act which created the Court of Customs Appeals), Section 12 provided for the appointment by the President, by and with the advice and consent of the Senate, of nine "general appraisers of merchandise", at salaries of \$9,000 per annum. The Board sat at times as a board of nine, at times in panels of three members each (denominated Board 1, Board 2, and Board 3), and at times through its individual members. The President had authority to designate one member of the Board as "president" of the Board, and others to act in his absence. The Board had power to establish rules of evidence, practice, and procedure for the conduct of its business, and it (and each member) had "all the powers of a circuit court of the United States" in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt. *Ibid.* (36 Stat. 98-99).

The Board's principal function was to hear and determine appeals by importers from decisions of the collectors of customs as to the "rate and amount of duties chargeable upon imported merchandise, includ-

ing all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage)." § 14, as amended, 36 Stat. 100. The Board's decisions in these so-called "classification" cases were "final and conclusive upon all persons interested therein", subject only to appeal to the Court of Customs Appeals. *Ibid.* In addition, the Board heard and determined appeals by importers or the collectors of customs from decisions of "appraisers" (executive officials stationed at the several ports) as to the value of imported goods. § 13, as amended, 36 Stat. 99-100. In these so-called "reappraisement" cases, the decision of the Board was absolutely final ("\* \* \* shall not be subject to review in any manner for any cause in any tribunal or court \* \* \*"). *Ibid.*<sup>1</sup>

Members of the Board held office "during good behavior," subject, however, to removal by the President, "after due hearing", "for the following causes, and no other: Neglect of duty, malfeasance in office, or inefficiency." § 12, as amended, 36 Stat. 98. (As originally established in 1890, members of the Board were removable by the President "at any time" for any of the three stated causes. § 12, 26 Stat. 136.<sup>2</sup> In *Shurtleff v. United States*, 189 U.S. 311 (1903), the

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<sup>1</sup> In 1930, appeals (to the Court of Customs and Patent Appeals) from decisions of the Customs Court (the successor of the Board of General Appraisers) in reappraisement cases, on "questions of law only", were authorized for the first time. Tariff Act of June 17, 1930, c. 497, § 501, 46 Stat. 590, 730. See 28 U.S.C. 2687.

<sup>2</sup> In addition, under the original Act of 1890, members of the Board were authorized to exercise (in addition to their judicial functions in reappraisement and classification cases) such supervisory functions over appraisements and classifications, "under the general direction of the Secretary of the Treasury", as might be needful to secure lawful and uniform appraisements and classifications at the several ports. § 12, 26 Stat. 136. The latter provision (among others) was eliminated

President's removal power was held to be absolute, notwithstanding the statutory specification of causes. The Act of May 27, 1908, c. 205, § 3, 35 Stat. 403, 406, amended the 1890 Act so as to provide that all members of the Board (those theretofore and those thereafter appointed) should serve "during good behavior," retaining, however, the President's power of removal for any of three stated causes, but adding the requirement that removal be only "after due hearing."<sup>3</sup>)

In 1926, the name of the Board was changed to the "United States Customs Court," and the titles of its members to the "chief justice" and "associate justices," without, however, any change in its powers, duties, or membership. Act of May 28, 1926, c. 411, 44 Stat. (Part 2) 669. The legislative history of this Act indicates that its purpose was to make the Board, which had repeatedly been held by the courts to be essentially a judicial tribunal,<sup>4</sup> a court in name as

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from Section 12 by the amendatory Act of 1909, 36 Stat. 98-99.

<sup>3</sup> The Board's "powers of a circuit court" in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt (see, *supra*, p. 131) were also first conferred by the 1908 Act (§ 3, 35 Stat. 406). Previously, the Board's powers of compulsory process were more limited (penalty of \$100 for failure to comply). § 17 of the 1890 Act, 26 Stat. 139.

<sup>4</sup> See *In re Van Blankensteyn*, 56 Fed. 474, 477 (C.A. 2, 1892); *Marine v. Lyon*, 65 Fed. 992, 994 (C.A. 4, 1895); *Stone v. Whitridge, White & Co.*, 129 Fed. 33, 36 (C.A. 4, 1904), reversed on other grounds *sub nom. United States v. Whitridge*, 197 U.S. 135; *United States v. Kurtz*, 5 Ct. Cust. App. 144, 146 (1914); *Atlantic Transport Co. v. United States*, 5 Ct. Cust. App. 373 (1914); *Yee Chong Lung & Co. v. United States*, 11 Ct. Cust. App. 382, 385 (1922); *Lewis & Conger v. United States*, 13 Ct. Cust. App. 22, 23-24 (1925); *United States v. McConaughey & Co.*, 13 Ct. Cust. App. 112, 118 (1925);

well as in fact, in order to avoid confusion, particularly among foreign governments with which the Board had frequently to deal. See H. Rept. 184, 69th Cong., 1st sess., pp. 1-4, and S. Rept. 781, 69th Cong., 1st sess., pp. 1-2, on H.R. 7966; see also 67 Cong. Rec. 4796-4797.

In 1929, in a *dictum* in *Ex parte Bakelite Corporation*, 279 U.S. 438, 457-458, this Court said of the Customs Court:

Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties or personnel. [Citing the Act of May 28, 1926, *supra*.] The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. [Footnote omitted.] But its functions, although mostly quasijudicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.

In 1930, the Customs Court was "continue[d] as now constituted" by Section 518 of the Tariff Act of June 17, 1930, c. 497, 46 Stat. 590, 737. The same section changed the names of the court's members to "judges" (from "justices"), fixed their salaries at \$10,000<sup>5</sup> and provided that they should hold office during good behavior (thus terminating the President's power of removal, see *supra*, pp. 132-133). The 1930 Act also effected various other changes relating

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*United States v. Macy & Co.*, 13 Ct. Cust. App. 245, 248-249 (1925); *Johnson Co. v. United States*, 13 Ct. Cust. App. 373, 377 (1926).

<sup>5</sup> The amount then being received by district court judges. Judicial Code, § 2, as amended by the Act of December 13, 1926, c. 6, § 1, 44 Stat. (Part 2) 919 (28 U.S.C. (1934 ed.) 5).

to the powers and procedure of the court. *E.g.*, §§ 501-502, 509-511, 514-519, 46 Stat. 730-731, 733-734, 734-739.

In 1940, the provisions of the 1930 Tariff Act continuing the court as then constituted were transferred to the Judicial Code, as Section 187(a). Act of October 10, 1940, c. 843, § 1, 54 Stat. 1101.

In 1956, as pointed out *supra*, pp. 54-55, 58, the court was declared by Congress to be a court established under Article III of the Constitution. Act of July 14, 1956, c. 589, § 1, 70 Stat. 532, amending Section 251 of Title 28 of the United States Code.

The currently applicable provisions pertaining to the constitution, jurisdiction, and procedure of the court are contained in 28 U.S.C. 251-255, 1581-1583, 2631-2642.

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No. 481

JOHN F. DAVIS, CLERK

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1961

BENNY LURK, Petitioner

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

BRIEF ON BEHALF OF THE CHIEF JUDGE AND THE  
ASSOCIATE JUDGES OF THE UNITED STATES  
COURT OF CUSTOMS AND PATENT APPEALS.  
AMICI CURIAE

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the Court of Customs and  
Patent Appeals, Amici Curiae*

January, 1962

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1961

—  
No. 481  
—

BENNY LURK, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

—  
**BRIEF ON BEHALF OF THE CHIEF JUDGE AND THE  
ASSOCIATE JUDGES OF THE UNITED STATES  
COURT OF CUSTOMS AND PATENT APPEALS,  
AMICI CURIAE**

—  
**THE INTEREST OF THE AMICI CURIAE**

This case presents the question, whether a judge who retired from the Court of Customs and Patent Appeals prior to 1958 could constitutionally preside at petitioner's criminal trial in the United States District Court for the District of Columbia. Considera-

tion of this issue may lead to the question, whether the Court of Customs and Patent Appeals is a constitutional or a legislative court. The *amici curiae* have an obvious interest in the determination of these questions, which touch directly upon the status of the Court of Customs and Patent Appeals and its judges.

#### SUMMARY OF ARGUMENT

1. The decision in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) was based upon mistaken premises and should be re-examined and overruled. The Payne-Aldrich Tariff Act of August 5, 1909, which created the Customs Court, conferred upon that Court the jurisdiction of a constitutional or Article III court, to determine certain cases and controversies arising under the Constitution, the laws of the United States, and treaties. Prior to the enactment of the Payne-Aldrich Tariff Act, this identical jurisdiction was exercised by the circuit courts, with review by the circuit courts of appeals and by this Court. There can be no doubt that such jurisdiction was determinative and judicial in character, and not administrative or advisory. Our conclusion as to the nature of the customs jurisdiction of the Court of Customs Appeals is reinforced by the fact that this Court now exercises general certiorari jurisdiction to review judgments in customs cases. It is no answer to say that the judgments of the Customs Court were not judicial determinations, since the matters involved in appeals to that court had been at times confided for determination to the executive branch of the government. There are many matters within the jurisdiction of Article III district courts which Congress might entrust to executive or administrative determination. An example of

such matters is found in the Federal Tort Claims Act (28 U.S.C. 1346) which affords a judicial remedy to one injured by the negligent act of a government employee, but which might have provided a remedy by way of an appeal to an executive or an administrative body.

The particular jurisdiction of the Court of Customs Appeals which was involved in the *Bakelite* case was the jurisdiction of that court to review, on questions of law, the proceedings of the Tariff Commission leading to recommendations to the President in respect of tariffs. This jurisdiction was not conferred upon the court until 13 years after its creation and such matters have constituted only a minute fraction of the court's business. The substantial and fundamental jurisdiction of the court, under both the Payne-Aldrich Tariff Act of 1909 and the Tariff Act of 1930, has had to do with cases and controversies which receive judicial determination and in which the court renders final and binding judicial decisions.

The opinion in the *Bakelite* case was mistaken in describing the patent and trade-mark jurisdiction of the Court of Customs and Patent Appeals as "advisory". Although this description was supported by the decision in *Postum Cereal Company v. California Fig Nut Company*, 272 U.S. 693 (1927), a change in the statute, two months after the *Postum* decision, gave finality to appellate decisions in patent and trade-mark cases. This statutory change was apparently not brought to the attention of this Court at the time of the argument in the *Bakelite* case. In later patent cases, *Hoover Co. v. Coe*, 325 U.S. 79 (1945) and *Special Equipment Co. v. Coe*, 324 U.S. 370 (1945),

this Court has recognized the finality of patent judgments in District Court proceedings, which stand upon the same footing with respect to finality as judgments of the Court of Customs and Patent Appeals.

2. Even assuming that the Court of Customs and Patent Appeals is a "legislative court", Congress had power under Article I, Section 8, Clause 17 of the Constitution to provide for the assignment of Judge Jackson to the United States District Court for the District of Columbia. In providing for such assignment, Congress acted as a legislature for the District of Columbia, exercising the same powers that are vested in a state legislature. From early days, Congress has recognized the unique status of the District of Columbia courts and in particular the fact that they play a dual role, exercising at the same time the jurisdiction of United States District courts and the jurisdiction of state courts. Thus, Congress has established special statutory or "legislative" courts for the trial of criminal cases in the District of Columbia. Such a court is the Municipal Court for the District of Columbia, which, concurrently with the United States District Court, now has original jurisdiction over all cases involving misdemeanors committed in the District of Columbia. Although a defendant in the Municipal Court is, of course, entitled to a jury trial and to the other guaranties of personal liberty provided in the Constitution, that Court is nevertheless a "legislative" court. It is plain that Congress, in its capacity as a legislature for the District of Columbia, might constitutionally provide for the trial of all District of Columbia criminal cases before such a legislative court; and this being so, the petitioner was deprived of no constitutional

right even though he was tried before a "legislative" judge.

Judge Jackson was appointed a Judge of the United States by the President with the advice and consent of the Senate, pursuant to a statute providing that he should hold office during good behavior. It is fanciful to suggest that he lacks the independence necessary to qualify him for service in a criminal trial in the United States District Court for the District of Columbia. If the petitioner's argument to this effect be sound, then all of the proceedings of the inferior criminal courts of the District of Columbia for over one hundred years have been unconstitutional and void.

#### **ARGUMENT**

The *amici curiae* support the position of the United States, that the Court of Customs and Patent Appeals is a court created and existing under Article III of the Constitution. The *amici curiae* also agree with the government that, even assuming the "legislative" character of the Court of Customs and Patent Appeals, Congress was empowered by the Constitution, Article I, Section 8, Clause 17, to authorize the judges of that court, including retired judges, to serve on the superior courts of the District of Columbia.

Without repeating all of the arguments advanced in the government's able and scholarly brief, the *amici curiae* wish to add a few words to focus attention upon certain matters which in their opinion are of particular importance and significance.

## I

**The Decision in *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929)  
Should Be Re-Examined and Overruled**

The cornerstone of the petitioner's argument is the proposition that the Court of Customs and Patent Appeals is a legislative court, exercising only such powers as could be exercised by executive officers of the government and incapable of receiving "Article III powers". (Petitioner's Brief, pp. 44 ff). The petitioner rests this proposition upon the decision of this Court in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). While we agree, of course, that the petitioner has correctly stated the holding of the *Bakelite* case, we submit, with all respect, that the *Bakelite* decision should be re-examined and overruled.

The basis of the *Bakelite* decision was the Court's finding that:

"... The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the customs court, formerly called the board of general appraisers. The appeals include nothing which inherently or necessarily requires judicial determination but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid, but this does not make the matters involved in the protests any the less susceptible of determination by executive offi-

cers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings." (279 U.S. 458).

From this premise, the Court reached the conclusion that the Court of Customs Appeals was a legislative court. The "true test" said the Court, "lies in the power under which the court was created and in the jurisdiction conferred." (279 U.S. 459).

The Court of Customs Appeals—now the Court of Customs and Patent Appeals—was created by the Payne-Aldrich Tariff Act of August 5, 1909,<sup>1</sup> to review the customs decisions of the Board of General Appraisers, now the Customs Court. The Act (Sec. 29, para. 7) provided that the Court of Customs Appeals:

"\* \* \* shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this Act, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgment or decrees of said Court of Customs Appeals shall be final in all such cases."

Prior to the enactment of the Payne-Aldrich Tariff Act of August 5, 1909, the circuit courts exercised appellate jurisdiction over the decisions of the Board of General Appraisers, with the right of Appeal to

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<sup>1</sup> c. 6, Sec. 28, 36 Stat. 11, 91, 105-108. The pertinent test of the statute is set forth in the Appendix to the government's Brief, p. 121 ff.

the Circuit Courts of Appeals, and with certificate and certiorari jurisdiction in this Court.<sup>2</sup> Pursuant to this statutory scheme, many appeals from the decisions of the Board of General Appraisers were heard by the circuit courts and were reviewed by the Circuit Courts of Appeals and by this Court. See e.g. *Goat & Sheep-skin Co. v. United States*, 206 U.S. 194 (1907); *Faber v. United States*, 221 U.S. 649 (1911).

No argument is necessary to demonstrate that the appeals from decisions of the Board of General Appraisers which were heard by the Circuit Courts and reviewed by the Circuit Courts of Appeals and by this Court were "cases" and "controversies" arising under the Constitution, the laws of the United States, and treaties. In other words, the jurisdiction of these Article III courts in respect of such matters was determinative and judicial in character, and not administrative or advisory. And, as we have seen, this was precisely the jurisdiction which was transferred to the Court of Customs Appeals by the Payne-Aldrich Tariff Act of 1909.

Moreover, the Payne-Aldrich Tariff Act further provided (para. 6) that all customs cases then pending in a circuit or district court might be reviewed on appeal by the Court of Customs Appeals. If the reasoning of the *Bakelite* decision is sound, then it would appear that the circuit and district courts—Article III courts—were exercising legislative or administrative powers in customs cases; and that after the passage of the Payne-Aldrich Act, the Court of Customs Appeals—a legislative court—was exercising appellate

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<sup>2</sup> Act of March 3, 1891, c. 517, Sec. 5-6, 26 Stat. 826, 827-828; Act of May 27, 1908, c. 205, Sec. 2, 35 Stat. 404.

jurisdiction over the judgments of Article III courts. We submit that such reasoning cannot be sustained.

Our conclusion as to the nature of the jurisdiction of the Court of Customs Appeals is reinforced by the fact that by the Act of August 22, 1914, c. 267, 38 Stat. 703, the Supreme Court was given limited certiorari jurisdiction to review cases from the Court of Customs Appeals; and that since 1930 this Court has had and has exercised general certiorari jurisdiction with respect to such judgments. Tariff Act of June 17, 1930, c. 497, Sec. 647, 46 Stat. 76; see e.g. *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371 (1940); *Barr v. United States*, 324 U.S. 83 (1945).

We submit further that the opinion in the *Bakelite* case was mistaken in concluding that since the matters involved in appeals to the Customs Court had been at times confided for determination to the Secretary of the Treasury, without recourse to judicial proceedings, the judgments of the Customs Court were not judicial. As this Court said in *Den v. The Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1856) :

“\* \* \* there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”

The fact that a citizen aggrieved by a judgment of the Board of General Appraisers at one time had only a remedy by way of an administrative appeal, or even no remedy at all, should not, we submit, alter or effect the judicial character of his remedy by way of an appeal

to a United States court, as provided by the Payne-Aldrich Act. There are many matters within the jurisdiction of Article III district courts which Congress might have entrusted to executive or administrative determination. For example, it was not until recently that the Federal Tort Claims Act (28 U.S.C. 1346) afforded a judicial remedy to one injured by the negligent act of a government employee; and Congress might have confided the determination of such claims to an executive or administrative body. It cannot be doubted, however, that actions under the Federal Tort Claims Act are the proper business of Article III Federal courts, and that judgments in such actions are judicial judgments.

The particular jurisdiction of the Court of Customs Appeals which was involved in the *Bakelite* case was the jurisdiction of that Court to review, on questions of law, the proceedings of the Tariff Commission leading to recommendations to the President in the matter of tariffs. This jurisdiction was conferred upon the Court by Section 316 of the Tariff Act of 1922, 42 Stat. 943—thirteen years after the creation of the Court of Customs Appeals. Only six cases under Section 316 of the Tariff Act of 1922, and the corresponding Section 337 of the Tariff Act of 1930, have ever reached the Court of Customs Appeals and the Court of Customs and Patent Appeals. These cases are carried in a special docket maintained by the Court, indicating that such matters are rare, and in fact, almost unique in the catalogue of the Court's business. Certainly, the constitutional status of the Court should not depend upon such a minute fraction of its jurisdiction.

The present customs jurisdiction of the Court of Customs and Patent Appeals arises out of the Act of June 17, 1930, known as the "Tariff Act of 1930" (19 USCA 1554, et seq), together with the Reciprocal Trade Agreements Act of June 12, 1934, as Extended, 19 USCA 1351, et seq. Seventy-five percent of the merchandise covered by the Tariff Act of 1930 has been made the subject of trade agreements under the Reciprocal Trade Agreements Act of 1934 and extensions thereof. Questions arising under these statutes and international agreements are not matters which "include nothing which inherently or necessarily requires judicial determination \* \* \* matters the determination of which may be \* \* \* committed exclusively to executive officers". On the contrary, they are cases which must receive judicial determination, and which do receive judicial determination in the Court of Customs and Patent Appeals. A few examples will suffice to illustrate the point.

In *United States v. Schmidt Pritchard & Co., Mangano Cycles Co.*, 47 CCPA 152, cert. den, 364 U.S. 919, C.A.D. 750 (1960), the Court of Customs and Patent Appeals held that a Presidential Proclamation setting a rate of duty exceeded the powers of the President and was therefore void. Certiorari was denied by this Court (364 U.S. 919), the judgment of the Court of Customs and Patent Appeals became final, and the rate of duty which the President had undertaken to set was abrogated. In *Star-Kist Foods, Inc. v. United States*, 47 CCPA 52, 275, F. 2d 472, C.A.D. 728 (1959), the appellant challenged the constitutionality of the Trade Agreements Act of 1934 and the validity of a trade agreement with Iceland, made pursuant thereto. The Court held that the Trade Agreements Act was

constitutional and the trade agreement with Iceland was valid. In *United States v. The Best Foods, Inc.*, 47 CCPA 163, C.A.D. 751 (1960), the appellant challenged a Presidential proclamation imposing an additional fee of two cents a pound on an increased peanut quota of fifty-one million pounds, pursuant to the Agricultural Adjustment Act, as Amended, 7 U.S.C. 624. The Court held that the Presidential proclamation was invalid insofar as it imposed a fee.

It would be going far to hold that the matters involved in such cases are only matters which might be committed exclusively to the determination of executive officers. Indeed, we believe that it would be both unjust and absurd to submit to the determination of an executive officer a case in which a private litigant challenges the formal and considered action of the Chief Executive. Obviously, fairness requires that such a challenge be submitted to an independent and impartial judicial tribunal.

The action of the Court of Customs Appeals, which was presented for the examination of the Supreme Court in the *Bakelite* case, was far different from the judgments of the Court in the cases we have cited. In the *Bakelite* case, the Court of Customs Appeals, pursuant to Section 316 of the Tariff Act of 1922, reviewed proceedings leading to a *recommendation* to the President by the Tariff Commission. The distinction between such a review of a recommendation and a final and binding judicial decision between litigants is obvious.

The opinion in the *Bakelite* case refers to the patent jurisdiction of the Court of Customs Appeals as "the advisory jurisdiction in respect of appeals

from the Patent Office which formerly was vested in the court of appeals of the District of Colummia". (279 U.S. 460). The "advisory" nature of this jurisdiction was thought to buttress the conclusion that the Court of Customs Appeals was a legislative court. We submit, however, that the opinion was in error in describing the jurisdiction as "advisory".

The reference to "advisory jurisdiction" was consistent with the decision in *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693 (1927). In that case, this Court held that a decision of the Court of Appeals of the District of Columbia under Section 9 of the Act of February 20, 1905, instructing the Commissioner of Patents as to whether or not a trade-mark should be registered, was not a judicial judgment. The Court said (272 U.S. 698, 699) :

"It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term 'case' is used in the third article of the Constitution. Section 9 of the Trade-Mark Act of 1905, applies to the appeal taken under it the same rules which under § 4914, Rev. Stat. Comp. Stat. § 9459, 7 Fed. Stat. Anno. 2d ed. p. 202 apply to an appeal taken from the decision of the Commissioner of Patents in patent proceedings. \* \* \* Neither the opinion nor decision of the court of appeals under § 4914, Rev. Stat. or § 9 of the Act of 1920, precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this court which can only review judicial judgments."

At the time of the *Postum* decision on January 3, 1927, there was reason to hold that patent and trademark proceedings in the Court of Appeals for the District of Columbia were advisory or administrative. At that time, the statutes governing such appeals (RS 4915, 4916) permitted a litigant disappointed by the rulings of the Patent Office to take a direct appeal to the Court of Appeals and then, if still dissatisfied with the appellate ruling of that Court, to institute an equity suit in the United States District Court to compel the issuance of the patent. The appeal to the Court of Appeals for the District of Columbia and the original proceeding in equity were not mutually exclusive; in fact the statute was construed to require an appeal before an equity suit could be filed. *Kirk v. Commissioner*, 16 D.C. (5 Mackey) 229 (1886); *Fekete v. Robertson*, 57 App. D.C. 73, 17 F. 2d 335 (1927); *Cooper v. Robertson*, 38 F. 2d 852 (1930). However, on March 2, 1927, two months after the *Postum* decision, Congress amended the statute, making the equity suit and the appeal to the Court of Appeals for the District of Columbia mutually exclusive. 44 Stat. 1336 (1927). Thereafter, a litigant was required to elect between a review by the Court of Appeals for the District of Columbia and a proceeding in the District Court under the provisions of RS 4915 or 4916; and in either case the resulting judgment was final. This is the law today, that is, an applicant may appeal to the Court of Customs and Patent Appeals or he may bring a civil action in the United States District Court for the District of Columbia; but he may not pursue both remedies, and the judgment in either case is final. 35 U.S.C. 145, 146.

We find no reference in the briefs and records in the *Bakelite* case to this change in the statute, subsequent to the *Postum* decision, and there is no mention of the change in the *Bakelite* opinion.

The Court in the *Postum* case found an additional indication, that the patent and trademark decisions of the Court of Appeals of the District of Columbia lacked finality, in the fact that the validity of a patent or trade-mark issued as a result of such a decision might be challenged in a later independent suit, such as an infringement action. It was thought that this fact precluded review of such judgments by this Court. The petitioner in his brief (p. 52) now cites the *Postum* case as authority for his claim that patent and trade-mark judgments of the Court of Customs and Patent Appeals are likewise non-reviewable administrative judgments. In this connection, petitioner also cites *Pacific Northwest Canning Co. v. Skookum Packers Assn.*, 283 U.S. 858 (1931), and *McBride v. Teeple*, 311 U.S. 649 (1940). In these cases, certiorari to review decisions of the Court of Customs and Patent Appeals was denied "for want of jurisdiction", and in each case this Court cited the *Postum* case as a basis for the denial. The *Skookum Packers* case involved a trade-mark, while *McBride v. Teeple* was a patent case. The flaw in the petitioner's argument, however, is that nineteen years after the denial of certiorari in the *Skookum* case and fifteen years after the denial in the *Teeple* case, this Court reviewed on the merits two patent cases which originated in the United States District Court for the District of Columbia under RS 4915, *Hoover Co. v. Coe*, 325 U.S. 79 (1945); *Special Equipment Co. v. Coe*, 324 U.S. 370 (1945); and that with respect to patent validity,

District Court patent proceedings under RS 4915 have no more finality than proceedings in the Court of Customs and Patent Appeals. Whether a patent issues as a result of an appeal to the Court of Customs and Patent Appeals or as a result of a proceeding in the District Court, it can, in a later suit, be challenged and held invalid. See *Battery Patents Corp. v. Chicago Cycle Supply Co.*, 111 F. 2d 861 (CCA 7, 1940), in which a patent issued as a result of proceedings under RS 4915 in the District of Columbia courts was held to be invalid. We submit, therefore, that the conclusion is plain that this Court no longer recognizes as sound and controlling the theory that a patent judgment lacks finality merely because the applicant's patent may be questioned in some later and independent proceeding. It would seem that this Court now follows the reasoning that a judgment which concludes the rights of the parties before the Court is in fact a final judicial judgment.

We submit that the decision in the *Bakelite* case was based upon mistaken premises and that it should be overruled.

## II

**Even Assuming the Legislative Character of the Court of Customs and Patent Appeals, Congress Had Power Under the District of Columbia Clause of the Constitution to Authorize the Judges of That Court, Including Retired Judges, to Serve on the Superior Courts of the District**

At the time of Judge Jackson's appointment to the Court of Customs and Patent Appeals in 1937, a statute provided (28 U.S.C. 22 (1934 ed)):

"The judges of the United States Court of Customs and Patent Appeals, or any of them, whenever the business of that court will permit, may if in the judgment of the Chief Justice of the

United States the public interest requires, be designated and assigned by him for service from time to time, and until he shall otherwise direct, in the Supreme Court of the District of Columbia or the United States Court of Appeals for the District of Columbia, when requested by the Chief Justice of either of said courts." (28 U.S.C. § 22 (1934 ed)).

In 1958, the statute was broadened to provide for assignments to courts throughout the country. 28 U.S.C. 291-295 (1958 ed). The assignment of retired judges was specifically authorized (28 U.S.C. 294; Appendix to Government's Brief, p. 120), and it was pursuant to this provision that Judge Jackson was assigned by the Chief Justice to serve as District Judge of the United States District Court for the District of Columbia (Petitioner's Brief, p. 11).

We submit that the United States Court of Appeals for the District of Columbia Circuit was correct in its conclusion that in view of the "broad sweep" of the legislative authority of Congress over the Federal District there can be no doubt of the power of Congress to provide for the assignment of Judge Jackson to the District of Columbia court.

Judge Jackson was appointed a Judge of the United States by the President of the United States with the advice and consent of the Senate. He was appointed and commissioned pursuant to a statute providing that he should hold office during good behavior. In the light of these facts, it seems fanciful to suggest that he lacks the independence necessary to qualify him for service on any United States District Court. It would seem that as a Judge of the United States (see 28 U.S.C. 451) with life tenure, he might con-

stitutionally be assigned to any United States Court as Congress might provide. Because of the unique status of the District of Columbia courts, however, we need not reach the general question of whether Congress might constitutionally provide for the assignment of a judge of the Court of Customs and Patent Appeals to a District Court in any jurisdiction other than the District of Columbia.

In *O'Donoghue v. United States*, 289 U.S. 516 (1933) this Court said (289 U.S. 545) :

“\* \* \* In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state. *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442, 443. ‘In other words,’ this court there said, ‘it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and powers of federal courts in the several States but with such authority as a State may confer on her courts. *Kendall v. United States*, 12 Pet. 524, 619. \* \* \* Subject to the guaranties of personal liberty, in the amendments and in the original constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts.’”

Again, in *The American and Ocean Insurance Co's v. 356 Bales of Cotton*, 1 Peters 511, 546 (1828), the Court said, in discussing the analogous question of the power of Congress to establish courts in the territories:

“\* \* \* Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the territories. In legislating for them,

Congress exercises the combined powers of the general and of a State government."

The petitioner was convicted of robbery in violation of Section 22-2901 of the District of Columbia Code. This statute was enacted by Congress pursuant to its power under Article I, Section 8, Clause 17, of the Constitution,<sup>3</sup> to exercise exclusive legislation over the District of Columbia; in other words, Congress in passing this statute was acting as a legislature for the District of Columbia, exercising the same powers that are vested in a state legislature. The jurisdiction conferred upon the District Court to try the petitioner for a violation of that statute was, in the language of this Court in the *O'Donoghue* case, "such authority as a State may confer on her courts." We submit that such jurisdiction, derived from Article I, may constitutionally be exercised by an Article I court or judge.

It is, of course, true that even though the jurisdiction of the District Court over the petitioner's case was derived from Article I of the Constitution, he was entitled "to the guaranties of personal liberty in the amendments and in the original constitution," *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 443; *Callan v. Wilson*, 127 U.S. 540 (1888); *District of Columbia v. Colts*, 282 U.S. 63 (1930). It does not follow, however, that among such guaranties was the right to be tried before an Article III court. On the contrary, it seems perfectly plain that Congress, in its

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<sup>3</sup>"The Congress shall have Power \* \* \* To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, \* \* \*."

capacity as a legislature for the District of Columbia, might constitutionally provide for the trial of all District of Columbia criminal cases before an exclusively legislative court.

From the early days of the republic, Congress has recognized the unique character of its jurisdiction over the District of Columbia, and the unique status of the District of Columbia courts. In particular, Congress has recognized that the District of Columbia courts play a dual role, exercising at the same time the jurisdiction of United States District Courts and the jurisdiction of state courts. Thus, in 1801, Congress established the Circuit Court of the District of Columbia, consisting of a Chief Judge and two assistant judges, to hold their respective offices during good behavior and to "have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States."<sup>4</sup> In 1802, Congress provided that the chief judge of the District of Columbia "shall hold a district court of the United States, in and for the said district, on the first Tuesday of April, and on the first Tuesday of October in every year, which court shall have and exercise, within the said district, the same powers and jurisdiction which are by law vested in the district courts of the United States."<sup>5</sup> In 1838, Congress established a criminal court in the District of Columbia, "for the trial of *all* crimes and offenses against the laws now in force in said District, and such as may be hereafter enacted."<sup>6</sup> (Emphasis added.)

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<sup>4</sup> Act of Feb. 27, 1801, 2 Stat. 103, 105, 106.

<sup>5</sup> Act of April 29, 1802, 2 Stat. 156, 166.

<sup>6</sup> Act of July 7, 1838, 5 Stat. 306.

All criminal cases pending in the circuit court were transferred to the new criminal court. The criminal court was composed of one judge, appointed by the President by and with the advice and consent of the Senate. The statute, however, did not specify that the judge should hold office during good behavior, and his salary was fixed at \$2,000 per annum, in contrast to the \$2,700 salary of the Chief Judge of the circuit court and the \$2,500 salaries of the two assistant judges.<sup>7</sup> This criminal court functioned until 1863, when it was abolished, along with the Circuit Court and the District Court and the Supreme Court of the District of Columbia was established.<sup>8</sup> The Supreme Court of the District of Columbia was given general jurisdiction in law and equity, and its judges were to be appointed by the President, by and with the advice and consent of the Senate, and to hold office during good behavior. In explaining the bill on the floor of the Senate, Senator Harris said:

“The judiciary of this District was established in 1801, and for the last sixty years, year after year, Congress has been patching up the system. It is complicated; it is incongruous.”

\* \* \*

“Mr. President, I have already stated that this bill contemplates a single and efficient organization of the courts in this District. It proposes to abolish the circuit court, composed now of three judges. It proposes to abolish the district court, which is held, as I understand, by the chief justice

<sup>7</sup> Act of March 3, 1811, 2 Stat. 660; Act of April 20, 1818, 3 Stat. 457.

<sup>8</sup> Act of March 3, 1863, 12 Stat. 752.

<sup>9</sup> Cong. Globe, 37 Cong. 3d Session, p. 1051, Feb. 18, 1863.

of the circuit court. It proposes to abolish the criminal court, of which there is a single judge, although that office is at present vacant. It proposes to organize in lieu of all of these courts—the circuit court, the district court, and the criminal court—a single court, to be composed of four judges, each of whom shall have jurisdiction to hold a circuit court or a district court or a criminal court, and shall have jurisdiction to hold a special term for the trial of equity causes, and to hold a circuit court for the trial of questions of law. The court is to be composed of four judges having this peculiar jurisdiction, abolishing all these other courts.<sup>10</sup>

In 1870, Congress established the Police Court of the District of Columbia, to have "original and exclusive jurisdiction over all offenses against the United States committed in the District of Columbia, not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary."<sup>11</sup> Prosecutions in the Police Court were by the United States Attorney.<sup>12</sup> Finally, in 1942, the Police Court was merged with the Municipal Court for the District of Columbia, with the same criminal jurisdiction formerly exercised by the Police Court.<sup>13</sup> The term of the old Police Court Judges was six years and the term of the Municipal Court Judges is now ten years.<sup>14</sup>

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<sup>10</sup> Cong. Globe, 37 Cong. 3d Session, p. 1137, Feb. 20, 1863.

<sup>11</sup> Act of June 17, 1870, 16 Stat. 153; See *Callan v. Wilson*, 127 U.S. 540 (1888) and Act of March 3, 1891, 26 Stat. 848.

<sup>12</sup> 16 Stat. 156.

<sup>13</sup> Act of April 1, 1942, 56 Stat. 190, 192 D.C. Code (1951) Title 11, Sec. 751, 755: D.C. Code (1961) Title 11, Sec. 751, 755(a), 755a.

<sup>14</sup> D.C. Code (1961) Title 11, Sec. 753.

Concurrently with the United States District Court, the Municipal Court now has original jurisdiction, with some few exceptions, "of all crimes and offenses committed in the said District not deemed capital or otherwise infamous and not punishable by imprisonment in the penitentiary."<sup>15</sup> This includes jurisdiction over many offenses constituting violations of general federal statutes, which if they occurred in a state would be tried in a United States District Court. Examples of such offenses are: embezzlement or larceny from the United States, when the value of the property involved is less than \$100;<sup>16</sup> unauthorized wearing of military medals and decorations;<sup>17</sup> misuse of name by a collection agency or a private detective agency to indicate that it is a federal agency;<sup>18</sup> instigating or assisting an escape of a federal prisoner charged with a misdemeanor;<sup>19</sup> refusal to answer a census question or giving a false answer.<sup>20</sup>

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<sup>15</sup> D.C. Code (1961) Title 11, Sec. 755a: "The municipal court shall have original jurisdiction concurrently with the United States District Court for the District of Columbia, except where otherwise expressly herein provided, of all crimes and offenses committed in the said District not capital or otherwise infamous and not punishable by imprisonment in the penitentiary, except libel, conspiracy, and violation of the post-office and pension laws of the United States; and also of all offenses against municipal ordinances and regulations in force in the District of Columbia. The said court shall also have power to examine and commit or hold to bail, either for trial or further examination, in all cases, whether cognizable therein or in the District Court of the United States for the District of Columbia."

<sup>16</sup> 18 USCA 641.

<sup>17</sup> 18 USCA 702.

<sup>18</sup> 18 USCA 712.

<sup>19</sup> 18 USCA 752.

<sup>20</sup> 13 USCA 221.

From this brief history, it is clear that the trial before a legislative court of persons accused of crime in the District of Columbia is, in the language of Circuit Judge Prettyman, "nothing new." On the contrary, these trials have been taking place since the earliest days of the District of Columbia. We submit that the court below was clearly right in its conclusion that such trials are proper, in view of the broad sweep of Congressional authority over the Federal District. Both reason and the legislative precedents of more than a century support the decision of the Court of Appeals.<sup>21</sup>

If the petitioner is correct in his argument that the trial of a criminal case in the District of Columbia

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<sup>21</sup> It may be noted that on the civil side, the Municipal Court of the District of Columbia has exclusive jurisdiction of actions "including counterclaims and crossclaims, in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorney's fees, protest fees, and costs, does not exceed the sum of \$3,000 and, in addition, shall also have exclusive jurisdiction of such actions against executors, administrators and other fiduciaries". D.C. Code (1961) Title 11, Sec. 755(a). Moreover, D.C. Code (1961) Title 11, Sec. 756(a) provides:

"If, in any action, other than an action for equitable relief, pending on the effective date of this section or thereafter commenced in the United States District Court for the District of Columbia, it shall appear to the satisfaction of the court at any time prior to trial thereof that the action will not justify a judgment in excess of \$3,000, the court may certify such action to the municipal court for the District of Columbia for trial. The pleadings in such action, together with a copy of the docket entries and of any orders theretofore entered therein, shall be sent to the clerk of the said Municipal Court, together with the deposit for costs, and the case shall be called for trial in that court promptly thereafter; and shall thereafter be treated as though it had been filed originally in the said Municipal Court, except that the jurisdiction of that court shall extend to the amount claimed in such action, even though it exceed the sum of \$3,000."

before a "legislative" judge or court is unconstitutional, then the proceedings of the inferior District of Columbia criminal courts for over a hundred years have been unconstitutional and void. We submit that such a conclusion cannot be sound.

#### CONCLUSION

In conclusion, the *amici curiae* submit that the decision in the *Bakelite* case should be overruled; that the Court of Customs and Patent Appeals should be held to be a constitutional court; and that, in any event, the assignment of Judge Jackson to preside at the petitioner's trial did not violate the Constitution.

Respectfully submitted,

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January, 1962

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 481

BENNY LURK,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**PETITIONER'S REPLY BRIEF**

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February, 1962.

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**PETITIONER'S REPLY BRIEF**

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This brief is filed on petitioner's behalf in response to certain contentions advanced by the United States in support of the opinion and judgment below, as reported at 296 F. 2d 360.

I

**The De Facto Doctrine Is Inapplicable Where, as Here,  
the Judge Allegedly Lacks Constitutional Authority to Act.**

In repetition of the claim advanced when this case was before the Court last term, the United States urges that Judge Jackson must be considered, at the least, a *de facto* judge whose title to office and whose exercise of authority cannot be challenged by petitioner, particularly where the challenge is made for the first time before the Court of Appeals.

But as the United States concedes (Brief, p. 28), the *de facto* doctrine relates only to those judges who in good faith and under color of authority possess and discharge the duties of a *de jure* office. As explained to this Court by the United States in its brief two terms ago in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, No. 138, Oct. Term 1959, pp. 27-28:

"The 'de facto' principle, in essence, has been applied where, unlike the case here, the judge's right to office is in question, or where, also unlike this situation, there has been an attack on some formal defect in a judge's authorization to act, such as in the case of designation and assignment. The 'de facto' doctrine does not reach the situation, such as the instant case, where a judge is expressly precluded from a specific type of judicial action by legislative mandate. *Were it otherwise, judges might then exceed their constitutional and statutory authority to act with impunity*, and the legislative prohibition of provisions like Section 46(c) would be completely undermined." [Emphasis added.]

In other words, where some constitutional or statutory provision forbids a judge from participating in a particular type of judicial proceeding, the *de facto* doctrine is inapplicable. To borrow the words of the Vermont Supreme Court in *Watson v. Payne*, 94 Vt. 299, 301:

" . . . [W]here it is expressly declared by constitutional or statutory provision that in certain specified cases a judge shall not sit or shall not act, or shall take no part in the decision, the authorities are almost uniform to the effect that any judgment rendered by such judge in such case is *coram non judice* and void."

See also *People v. Bork*, 96 N.Y. 188; *Case v. Hoffman*, 100 Wis. 314, 352-358.

This Court has consistently recognized this ground of inapplicability of the *de facto* doctrine and the voidness of judgments rendered by those judges lacking statutory or constitutional authority to act. Thus in *American Construction Co. v. Jacksonville Railway*, 148 U.S. 372, where an appellate judge participated, contrary to statute, in an appellate decision setting aside an order entered by him as trial judge, the Court voided the decision and ruled (148 U.S. at 387):

"If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside and quashed by any court having authority to review it by appeal, error or certiorari."

In *Frad v. Kelly*, 302 U.S. 312, 316, the order of a district judge was voided at the instance of a criminal defendant where the express provisions of the Probation Act negated the power of the judge to act after his designation and assignment to a particular court had expired. In *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, a judgment entered by two judges was voided where a statute required that the determination be made by three judges. Finally, in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 691, in reliance on the *American Construction* and *Frad* decisions, this Court voided an *en banc* judgment of a court of appeals in which a retired judge had participated contrary to a legislative mandate.

In this case, petitioner contends that Judge Jackson, as a retired legislative court judge, lacks constitutional authority to sit in the instant criminal proceeding and to exercise Article III judicial power. Indeed, the claim is

that, by virtue of Article III, there can be no *de jure* office of a District Judge by virtue of an assignment of a retired legislative court judge. In the same sense, there can be no *de jure* office of a District Judge by virtue of a purported assignment of an administrative agent or of a layman picked off a street corner. Article III, in other words, precludes the establishment by assignment of the office—*de jure* or otherwise—of District Judge in the person of anybody other than one duly qualified to exercise Article III judicial power.

Under these circumstances, the *de facto* doctrine does not and cannot come into operation. If there is no constitutional sanction for the exercise of judicial power by an assigned individual and if the “office” which he purports to hold exists only if there is such sanction,<sup>1</sup> “there can be no officer, either *de jure* or *de facto*.” *Norton v. Shelby County*, 118 U.S. 425, 441. To argue, as does the United States, that Judge Jackson held the “office” of District Judge and thus became at least a *de facto* judge is to indulge in a bootstrap argument and to assume the very point in issue. It would also mean, as the Government noted in its *American-Foreign Steamship* brief, that Judge Jackson could exceed his “constitutional . . . authority to act with impunity.”

Moreover, there are only 15 regular “offices” of District Judges in the District of Columbia. 28 U.S.C. §133. Judge Jackson’s assignment does not purport to designate him to execute the “office” of any of those 15 judgeships by reason of any vacancy therein or incapacity of an incumbent.

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<sup>1</sup> Realistically speaking, the only “office” which Judge Jackson can be said to hold is that of retired judge of the Court of Customs and Patent Appeals. In that capacity, he was assigned to sit as a District Judge on a temporary basis. But for purposes of the above argument, the term “office” is used with reference to the “office” of District Judge by assignment.

The Government concedes (Brief, p. 27) that Judge Jackson's "office" as District Judge exists only by operation of the assignment statute (28 U.S.C. §294), the very statute whose constitutionality in this respect is under attack. The Government's position can therefore be both described and answered by this Court's language in *Norton v. Shelby County*, 118 U.S. 425, 442:

"Their position is that a legislative Act, although unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Thus, in this case, the claim is that the Constitution precludes the use of 28 U.S.C. §294 or any other statute to effectuate the assignment of a retired legislative court judge to sit as an Article III District Judge. If the assignment statute is unconstitutional in this respect, in legal contemplation *a de jure* office by assignment never came into existence; and hence the *de facto* doctrine is completely without relevance. Under these conditions, the judgment rendered against petitioner by Judge Jackson "was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or certiorari." *American Construction Co. v. Jacksonville Railway*, 148 U.S. 374, 387.

It necessarily follows that petitioner may properly raise so basic a jurisdictional issue at any time, even if the first

time be at the appellate level.<sup>2</sup> In fact, this Court could raise it *sua sponte* if it were not otherwise pressed. And it is not without significance that the Court of Appeals below completely ignored the *de facto* defense urged by the United States and proceeded to deal with the merits of the constitutional issue. If the inhabitants of the District of Columbia, including this petitioner, have the constitutional "right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. 3" (*O'Donoghue v. United States*, 289 U.S. 516, 540), that right may be asserted by them at all appropriate moments; and the *de facto* doctrine is no answer to the assertion of that right.<sup>3</sup>

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<sup>2</sup> See *Lamar v. United States*, 241 U.S. 103, where this Court considered and resolved a contention relative to the validity of a judicial assignment despite the fact that the contention had not been raised either in the trial court or in the court of appeals, having been raised for the first time in a supplemental brief in this Court. See also *Moreno Rios v. United States*, 256 F. 2d 68 (C.A. 1).

<sup>3</sup> ". . . [T]he impropriety of these assignments, if any, may stem from constitutional requirements designed for the protection of litigants, especially criminal defendants, and the policy underlying these protections may be so basic that challenges should be allowed even though there is no reason to suppose actual prejudice has resulted to any party. Moreover, permitting such challenges may be a far more effective way of assuring the observance of constitutional requirements concerning the federal judiciary than reliance on the bringing of a writ of quo warranto at some future date." Comment, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133, 136, n. 25 (1962).

**II****The District of Columbia Clause of the Constitution Does Not Authorize the Assignment in Question.**

Relying upon the rationale of the court below, the United States argues (Brief, pp. 39-42) that, even assuming the legislative nature of the Court of Customs and Patent Appeals, Congress has authority under the District of Columbia clause of the Constitution (Article I, Section 8, Clause 17) to sanction the assignment of a retired judge of that court to sit as a judge of the District Court for the District of Columbia.

As noted more fully at pages 34-43 of petitioner's main brief, this argument cannot be sustained. Despite the fact that the superior courts of the District of Columbia may be vested with non-judicial powers not conferrable on other federal tribunals established under Article III, these District of Columbia courts remain essentially "constitutional courts of the United States, ordained and established under Art. 3 of the Constitution." *O'Donoghue v. United States*, 289 U.S. 516, 551. And to the extent that these District of Columbia courts exercise Article III judicial power, the District clause of the Constitution generates no authority for the exercise of such power by someone "incapable of receiving it." Put differently, the District clause in no way purports to affect the exercise of any power springing from some other section or clause of the Constitution. And if Article III prohibits the exercise of Article III power by a legislative court judge, Article I, Section 8, Clause 17 cannot remove that prohibition as respects the District of Columbia. As stated in the *O'Donoghue* opinion, 289 U.S. at 546, there is "no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the op-

erative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable."

More specifically, the Government contends that the District clause alone authorizes the designation for service on District of Columbia courts of judges "who might be . . . constitutionally ineligible for service on regular Article III courts." Brief, p. 40. This means that assignments can be made to the District of Columbia courts of judges who are constitutionally unprotected by the salary and tenure provisions of Article III. This contention, however, has been completely answered by the ruling in the *O'Donoghue case* that District inhabitants are as constitutionally entitled to have their cases heard and determined by Article III courts and judges as are the inhabitants of the various states. In the words of the *O'Donoghue* opinion (289 U.S. at 540) :

"It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. 3. We think it is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union."

The short of it is that the power of Congress to confer certain non-judicial functions on the District of Columbia

courts does not swallow up or destroy the basic Article III nature of those courts; whatever rights District inhabitants have with respect to having their cases heard by Article III judges are identical with those possessed by inhabitants of other states and are in no way limited by the plenary power of Congress to legislate for the District. To permit any discrimination against District inhabitants with respect to the exercise of Article III judicial power is totally unwarranted by the terms of the Constitution and raises grave questions of inequality in the administration of justice—questions which the *O'Donoghue* case put to rest.<sup>4</sup>

Finally, the Government stresses (Brief, pp. 41-42) that petitioner was tried for the offense of robbery, a crime outlawed by the District of Columbia Code, and that this Code was enacted by Congress in the exercise of its plenary power of legislating for the District. Hence, it is assumed, Congress could provide that the trial be presided over by a judge who derives his "basic position" from some constitutional source other than Article III.

The short answer is that the assignment statute (28 U.S.C. §294) in no way attempts to confine the assignment of any retired judge of the Court of Customs and Patent Appeals so as to perform only those judicial functions arising

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<sup>4</sup> ". . . [T]he rationale of the court of appeals in *Lurk* seems insupportable. The decision rests on the view that the plenary power of Congress over the District enables it to assign judges unprotected by the salary and tenure provisions of article III to the superior courts of the District. This position is totally inconsistent with the holding of *O'Donoghue*, which was based largely on the conclusion that citizens of the District are entitled to have their cases heard before judges protected by article III. Allowing temporary judges not so protected to sit on article III courts would permit circumvention of the *O'Donoghue* principle." Comment, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133, 153 (1962).

ing under the District of Columbia Code. Judge Jackson was assigned under that statute and under the terms of his designation "to serve as a district judge of the United States District Court for the District of Columbia and discharge the official duties thereof." See petitioner's main brief, pp. 11-12. And he has in fact presided over trials and rendered judgments in matters arising under the United States Code as well as under the District of Columbia Code.<sup>5</sup> The jurisdiction of the District Court for the District of Columbia is so completely integrated, for practical purposes, as between federal and District matters as to make it unrealistic to distinguish between the two in the distribution of the judicial work load. The location of this court at the seat of the national government makes it the focal point of a large percentage of federal-type proceedings. See, e.g., *Travis v. United States*, 364 U.S. 631. To disengage an assigned judge from participating in such federal actions would detract materially from his utility. See *O'Donoghue v. United States*, 289 U.S. 516, 535.

The more important answer is that the trial of a defendant accused of a felony as defined by the District of Columbia Code partakes of the very essence of the Article III judicial power of the District Court. See petitioner's main brief, pp. 39-43. By no stretch of the legal imagination can it be said that the power to try such a matter could lawfully or constitutionally be delegated to an executive officer

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<sup>5</sup> Among the numerous United States Code proceedings presided over in the District Court by Judge Jackson have been *United States v. Parke, Davis & Co.*, 365 U.S. 125 (Sherman Act proceeding), *Lancaster v. United States*, 293 F. 2d 519 (App. D.C.) (Mann Act violation), and *Brown v. United States*, No. 16,135, Jan. 12, 1962 (App. D.C.) (federal narcotics law violations). Moreover, petitioner's counsel is advised by the Chief Deputy Clerk of the Court of Appeals that among some 10 or 12 appeals from Judge Jackson's judgments now pending in the Court of Appeals, in which the constitutionality of Judge Jackson's assignment has been put in issue, there are several appeals involving convictions under the Mann Act and other federal statutes.

or an administrative board—and such non-delegability is the hard core test of the judicial nature of such a proceeding. Criminal trials in an Article III court such as the District Court for the District of Columbia call forth all the procedural and statutory devices which are the hallmarks of courts exercising the gamut of federal criminal power. And that power is invoked in precisely the same manner and to the same extent in District Code prosecutions as in proceedings arising under Title 18 of the United States Code. The pre-trial proceedings, the assignment of the cases, the calendar calls, the jury impanelings, the trial processes and the post-trial procedures are the same in both instances. A particular judge presides indiscriminately over both types of criminal cases.

Congress, in other words, has done no more than enlist the Article III powers of the District Court to help execute the District of Columbia Code—in the same manner as it has called forth those powers to assist in the execution of other Article I functions.<sup>6</sup> Because of that fact, the possibility that Congress might have given jurisdiction over District felony crimes to the Municipal Court for the District of Columbia is irrelevant.

Indeed, it may be doubted if criminal defendants in the District accused of felony violations can be deprived of trial before an Article III court or an Article III judge.<sup>7</sup> But

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<sup>6</sup> As the Government concedes (Brief, p. 112), "it is difficult to distinguish, in this connection, the District of Columbia power in Article I, Section 8, from the other heads of legislative authority in Article I."

<sup>7</sup> "The general reasons for article III guarantees seem applicable with special force to serious criminal prosecutions, whether under laws of national scope or under local enactments. There appear to be no practical reasons, such as exist for courts dealing with minor civil and criminal matters, for not applying article III to bodies trying such cases." Comment, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133, 154, n. 149 (1962).

that problem need not be faced here since Congress has in fact given District felony jurisdiction to the District Court. Moreover, any question as to the possible division of power as between the District Court and the Municipal Court relates not to the legislative-judicial problem which plagues the Court of Customs and Patent Appeals but to the permissible distinctions in the trials of major and petty offenses. See *District of Columbia v. Clawans*, 300 U.S. 617; *District of Columbia v. Colts*, 282 U.S. 63; *Callan v. Wilson*, 127 U.S. 540. The legislative characteristics of Judge Jackson are not the same as the non-Article III characteristics of Municipal Court judges. Their respective problems and status arise from entirely different constitutional considerations. And whatever power might lawfully be given to a Municipal Court judge to preside over a District felony trial is not automatically assignable to a retired or active judge of the Court of Customs and Patent Appeals.

### III

#### **The Incapacity of Judge Jackson to Receive or Exercise Article III Judicial Power Is Clear.**

The entire controversy over the constitutional status of the Court of Customs and Patent Appeals and of Judge Jackson must be viewed, as the Government concedes (Brief, p. 43), in the context of petitioner's right to be tried before an Article III judge, empowered to exercise Article III judicial power. What is involved here is not a demand for an advisory opinion on the legislative court concept. Every contention advanced with respect to the continuing validity of *Ex parte Bakelite Corp.*, 279 U.S. 438, or the effectiveness of the 1958 declaration by Congress as to the Article III nature of the Court of Customs and Patent Appeals, must be related to petitioner's rights as of the time of his trial before Judge Jackson on March 22, 1960.

In that connection, it must not be forgotten that petitioner's right to a trial before an Article III judge means a trial before a judge *constitutionally* protected as to tenure and compensation. Those protections of Article III, as *Evans v. Gore*, 253 U.S. 245, 253, makes plain, were designed not as a private grant to judges but as "a limitation imposed in the public interest." See also *O'Donoghue v. United States*, 289 U.S. 516, 532-533. These are constitutional provisions, therefore, which members of the public may insist be observed when they are subjected to trial in a federal court.

But it is not enough, as the Government seems to say (Brief, p. 44), that Judge Jackson has all the statutory qualifications of an Article III judge by way of salary and tenure. The important point is that he must have the constitutional qualifications of such a judge and be constitutionally protected against salary and tenure whims of Congress. And it is most important that the judges exercising Article III power in the District of Columbia have that *constitutional* protection. The Article III judicial provisions "apply with even greater force to the courts of the District than to the inferior courts of the United States located elsewhere, because the judges of the former courts are in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments." *O'Donoghue v. United States*, 289 U.S. 516, 535.

But the complete lack of the necessary *constitutional or Article III* protections surrounding Judge Jackson are evident from the following considerations:

1. This Court has declared that legislative courts, and necessarily the judges thereof, are "incapable of receiving"

or exercising Article III judicial power. *American Insurance Co. v. Canter*, 1 Pet. 511, 546.

2. This Court has authoritatively determined that the Court of Customs and Patent Appeals is plainly "a legislative and not a constitutional court." *Ex parte Bakelite Corp.*, 279 U.S. 438, 459. That declaration was expressly reaffirmed in *Williams v. United States*, 289 U.S. 553, 571. Nothing that the Government says in its extensive re-examination of the legislative history and of the functions and experience of the Court of Customs and Patent Appeals refutes the main consideration underlying the *Bakelite* opinion—that Congress established nothing more than a specialized tribunal dealing only with narrow matters that (a) could be, and indeed had been, given to administrative officers and boards for resolution, and (b) by their nature did not necessitate the invocation of the full judicial powers possessed by Article III tribunals. Confined to narrow, specialized subject matters and unequipped with the wide range of procedural and other powers of Article III courts, the Court of Customs and Patent Appeals stands today in precisely the same posture as of the time of the *Bakelite* and *Wms* decisions.

3. Because of the basic legislative nature of the Court of Customs and Patent Appeals, the judges thereof are not entitled to and do not share in the constitutional protections, or the judicial powers, designated in Article III. Whatever salary protection or life tenure these judges may have is a matter of present legislative desire, rather than constitutional compulsion.

The Government contends (Brief, p. 44) that the Congress has "irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court." But Congress

has done so only to the extent that it wants to leave its latest action unturned and therefore wants to think of that action as "irrevocable." In the legislative world, nothing is irrevocable unless the Constitution so commands. And unless and until this Court holds, as a matter of constitutional interpretation, that this tribunal has Article III status, there remains no constitutional barrier against future changes in the salary or tenure of judges of the Court of Customs and Patent Appeals.<sup>8</sup>

4. The 1958 declaration by Congress of the Article III status of the Court of Customs and Patent Appeals is totally ineffective to alter the constitutional position of that tribunal. This Court, as the supreme organ of government empowered to render definitive interpretations of the Constitution, has determined that this judicial body is an arm of the legislative branch of government and that it does not partake of the judicial powers enumerated in Article III. Such a determination by this Court is irrevocable—to borrow a word from the Government—insofar as contrary feelings by Congress are concerned. Until this Court

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<sup>8</sup> The 1932 salary cut decreed by Congress for the judges of the Court of Customs and Patent Appeals—a cut sustained by the ruling in *Williams v. United States*, 289 U.S. 553—stands as mute testimony of the constitutional power of Congress to reduce their salaries and of the judges' complete lack of constitutional protection against such diminutions. The United States claims (Brief, pp. 83-84) that this 1932 action is without significance since the Legislative Appropriations Act did not mention the Court of Customs and Patent Appeals by name and since the judges thereof voluntarily took the salary reduction. But the Act was passed after the *Bakelite* decision and it must be assumed that Congress knew of that decision when it decreed salary cuts for all judges except those whose compensation was protected by the Constitution against diminution. The *Bakelite* decision made it plain that, since the Court of Customs and Patent Appeals was a legislative court, its judges' compensation could be decreased—an interpretation which later flowered into a precise holding in *Williams*. It may thus fairly be said that the 1932 salary reduction was aimed specifically at the judges of this court.

changes its mind or until new or different functions are conferred upon the Court of Customs and Patent Appeals, the constitutional nature of that body remains unchanged.

The Government argues (Brief, p. 52) that the Congressional effort in 1958 to overrule the *Bakelite* decision and to substitute a legislative interpretation of the Constitution is effective as a declaration of "what powers it [Congress] had exercised when it established the court." Such a proposition amounts to no more than an untenable assertion that this Court's interpretation of the Constitution is subject to revision and reversal by Congress. The question is not what powers Congress thought it was exercising, but rather what constitutional powers were in fact evoked in light of the functions conferred upon the tribunal. As to the delineation of those powers, this Court speaks with finality.

5. Even if the 1958 declaration were to be found effective, it plainly speaks *in futuro* and cannot add to or change the powers of a judge who retired from the Court of Customs and Patent Appeals six years prior thereto.<sup>9</sup> Concededly, a retired judge retains the powers he possessed at the time of his retirement. *Booth v. United States*, 291 U.S. 339. But it does not follow that, after retirement, he may by legislative whim be transposed from the legislative to the judicial branch of the government. The 1958 declara-

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<sup>9</sup> The Government has renewed efforts (Brief, pp. 54-60) to demonstrate, through the use of "contexts" rather than plain language and the designation of unhelpful statements as "imprecise use of language," that the 1958 designation was meant not to change the nature of the court but merely to restate what the court had been since its inception. The efforts are not convincing. The 1958 declaration was clearly grounded on an intention to repeal the *Bakelite* determination and to declare that thenceforth the court was to be considered as established under Article III. See petitioner's main brief, pp. 66-67.

tion, to be effective, must be read as a revolutionary shift of personnel from one branch of the government to another. But just how a retired legislative court judge can, by the mere passage of a declaration, be transformed into a retired constitutional court judge is not explained by the United States.

Moreover, while Congress may increase the powers of incumbent judges and officials without the need for renomination or reconfirmation (*Shoemaker v. United States*, 147 U.S. 282, 301), it does not follow that renomination or reconfirmation is unnecessary when an individual is shifted from one arm of the government to another. To declare a legislative agent to be an Article III judicial officer is to do more than increase the powers of his office; it is to change the constitutional status and power of that individual. Renomination and reconfirmation would seem essential under such circumstances. Thus where territories have been admitted as states, the federal courts existing prior to statehood have always been considered to be new Article III courts following admission to the Union and new appointments have therefore been made. See *Benner v. Porter*, 9 How. 235; *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41; *Washington & I. R.R. v. Coeur D'Alene Ry. & Nav. Co.*, 160 U.S. 77. But again, the United States leaves unexplained the process by which a retired legislative agent, without renomination or reconfirmation and without in any way adding to the powers of the court from which he retired, can be transformed into a retired Article III judge. Certainly the 1958 declaration itself cannot be construed as a form of reappointment.

The conclusion is inescapable that Judge Jackson has never acquired the authority to exercise Article III judicial power. As stated in *Benner v. Porter*, 9 How. 235, 244, judges seeking to exercise the power of Article III courts

"must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution." Such investiture has never occurred in Judge Jackson's case. At the time of his appointment to the Court of Customs and Patent Appeals in 1937, through all his tenure thereon, and at the time of his retirement in 1952, that tribunal in the contemplation of the Constitution—by virtue of the *Bakelite* and *Williams* decisions then, as now, in full force—was not an Article III court. Judge Jackson thus acquired no Article III status by virtue of his appointment to or service in that court. And any effort to confer Article III status on Judge Jackson following his retirement flounders in the absence of some form of reappointment.

One final word should be said about the Government's desire to have the *Bakelite* case overruled and the legislative court doctrine buried insofar as specialized federal tribunals are concerned. That desire focuses upon the assumed premise of the *Bakelite* case (see Brief, p. 90) that Congress can vest in Article III courts only those matters "which inherently or necessarily require judicial determination" and that Congress cannot require Article III judicial determination of matters capable of administrative settlement. This reading of the premise is both misleading and incorrect.

What the *Bakelite-Williams-O'Donoghue* cases teach is that a specialized court which is established to do nothing more than what is capable of administrative settlement is a legislative rather than a constitutional tribunal. And what distinguishes an Article III court is its possession of jurisdiction over matters "which inherently or necessarily require judicial determination." Now it is true that Article III courts may also possess authority to adjudicate matters

capable of administrative determination. But the essential fact underlying their Article III status is the possession of strictly judicial power—with all the procedural and substantive powers encompassed thereby—to adjudicate the matters described in Article III which are not capable of administrative or legislative determination. A criminal felony trial is the prime example of such Article III judicial power.

No contention is made, of course, that the Court of Customs and Patent Appeals possesses one iota of jurisdiction which is not capable of delegation to, and execution by, an administrative body. It possesses no jurisdiction over what the *Williams* case (289 U.S. at 578) describes as “a controversy . . . of such a character as to require the exercise of the judicial power *defined by Art. 3.*” Only the federal district courts, courts of appeals and this Court deal with those inherently judicial matters, and only those courts possess Article III status.

Thus the *Bakelite* doctrine of legislative courts expresses a fundamental truth about our division of governmental powers. That truth is that the specialized federal tribunal, dealing *only* with matters capable of administrative determination, is in every real sense the equivalent of a quasi-judicial administrative agency and thus properly belongs in the legislative or executive branch of government. Only those tribunals possessing the jurisdiction and the means to deal with what is necessarily and exclusively judicial can acquire Article III status. This concept of the distinction between legislative and Article III courts needs reaffirmation, not erasure.

**Conclusion**

These various considerations, augmented by those spelled out in petitioner's main brief, compel the conclusion that the petitioner was deprived of his constitutional right to be tried in the District Court for the District of Columbia before a judge capable of receiving and exercising Article III judicial power.

Respectfully submitted,

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February, 1962.

# SUPREME COURT OF THE UNITED STATES

Nos. 242 AND 481.—OCTOBER TERM, 1961.

	The Glidden Company, etc., Petitioner,	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
242	v. Olga Zdanok et al.	
481	Benny Lurk, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1962.]

MR. JUSTICE HARLAN announced the judgment of the Court and an opinion joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEWART.

In *Ex parte Bakelite Corp.*, 279 U. S. 438, and *Williams v. United States*, 289 U. S. 553, this Court held that the United States Court of Customs and Patent Appeals and the United States Court of Claims were neither confined in jurisdiction nor protected in independence by Article III of the Constitution, but that both had been created by virtue of other, substantive, powers possessed by Congress under Article I. The Congress has since pronounced its disagreement by providing as to each that "such court is hereby declared to be a court established under article III of the Constitution of the United States."<sup>1</sup> The petitioners in these cases invite us to

<sup>1</sup> Act of July 28, 1953, § 1, 67 Stat. 226, added to 28 U. S. C. § 171 (Court of Claims); Act of August 25, 1958, § 1, 72 Stat. 848, added to 28 U. S. C. § 211 (Court of Customs and Patent Appeals). See also Act of July 14, 1956, § 1, 70 Stat. 532, added to 28 U. S. C. § 251 (Customs Court).

reaffirm the authority of our earlier decisions, and thus hold for naught these congressional pronouncements, at least as sought to be applied to judges appointed prior to their enactment.

No. 242 is a suit brought by individual employees in a New York state court to recover damages for breach of a collective bargaining agreement, and removed to the Federal District Court for the Southern District of New York by the defendant employer on the ground of diversity of citizenship. The employees' right to recover was sustained by a divided panel of the Court of Appeals, in an opinion by Judge J. Warren Madden, then an active judge of the Court of Claims sitting by designation of the Chief Justice of the United States under 28 U. S. C. § 293 (a).<sup>2</sup> No. 481 is a criminal prosecution instituted in the United States District Court for the District of Columbia and resulting in a conviction for armed robbery. The trial was presided over by Judge Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals sitting by similar designation.<sup>3</sup> The petitioner's application for leave to appeal to the Court of Appeals *in forma pauperis*, respecting the validity of this designation and alleged trial errors, was upheld by this Court last Term, 366 U. S. 712; we are now asked to review the Court of Appeals' affirmance of his conviction. Because of the significance of the "designation" issue for the federal judicial system, we granted certiorari in the two cases, 368 U. S. 814, 815, limited to the question whether

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<sup>2</sup> "The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals . . . to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises."

<sup>3</sup> 28 U. S. C. § 294 (d) authorizes assignment of a retired judge from either court, to "perform such judicial duties as he is willing and able to undertake" in any circuit.

the judgment in either was vitiated by the respective participation of the judges named.<sup>4</sup>

The claim advanced by the petitioners, that they were denied the protection of judges with tenure and compensation guaranteed by Article III, has nothing to do with the manner in which either of these judges conducted himself in these proceedings. No contention is made that either Judge Madden or Judge Jackson displayed a lack of appropriate judicial independence, or that either sought by his rulings to curry favor with Congress or the Executive. Both indeed enjoy statutory assurance of tenure and compensation,<sup>5</sup> and were it not for the explicit provisions of Article III we should be quite unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings.

Article III, § 1, however, is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record. It provides:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."<sup>6</sup>

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<sup>4</sup>The petition in No. 481 sought certiorari only as to that issue.

<sup>5</sup>10 Stat. 612 (1855), as amended, 28 U. S. C. § 173 (Court of Claims); 46 Stat. 590, 762 (1930), as amended, 28 U. S. C. § 213 (Court of Customs and Patent Appeals). Judge Madden was appointed in 1941, Brief for Petitioner in No. 242, pp. 7-8, and retired in 1961, 290 F. 2d xvi; Judge Jackson was appointed in 1937, Brief for Petitioner in No. 481, pp. 9-10, and retired in 1952, 193 F. 2d xv.

<sup>6</sup>The bearing of § 2 of Art. III on petitioners' claims is discussed later. *Infra*, p. 32-53.

Apart from this provision, it is settled that neither the tenure nor salary of federal officers is constitutionally protected from impairment by Congress. *Crenshaw v. United States*, 134 U. S. 99, 107-108; cf. *Butler v. Pennsylvania*, 10 How. 402, 416-418. The statutory declaration, therefore, that the judges of these two courts should serve during good behavior and with undiminished salary, see note 5, *supra*, was ineffective to bind any subsequent Congress unless those judges were invested at appointment with the protections of Article III. *United States v. Fisher*, 109 U. S. 143, 145; see *McAllister v. United States*, 141 U. S. 174, 186. And the petitioners naturally point to the *Bakelite* and *Williams* cases, *supra*, as establishing that no such constitutional protection was in fact conferred.

The distinction referred to in those cases between "constitutional" and "legislative" courts has been productive of much confusion and controversy. Because of the highly theoretical nature of the problem in its present context,<sup>7</sup> we would be well advised to decide these cases on narrower grounds if any are fairly available. But for reasons that follow, we find ourselves unable to do so.

## I.

No challenge to the authority of the judges was filed in the course of the proceedings before them in either case. The Solicitor General, who submitted briefs and arguments for the United States as an intervening party under 28 U. S. C. § 2403, has seized upon this circumstance to suggest that the petitioners should be precluded by the

<sup>7</sup> The abstractness of the present controversy is graphically demonstrated by the disparity in volume between records and briefs. The records in both cases amount to but 66 pages of motions, opinions, and the like, with no relevant transcripts of proceedings, while the briefs extend to 533 pages exclusive of appendices.

so-called *de facto* doctrine from questioning the validity of these designations for the first time on appeal.

Whatever may be the rule when a judge's authority is challenged at the earliest practicable moment, as it was in *United States v. American-Foreign S. S. Corp.*, 363 U. S. 685, in other circumstances involving judicial authority this Court has described it as well settled "that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public." *McDowell v. United States*, 159 U. S. 596, 602. The rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware. Although a United States Attorney may be permitted on behalf of the public to upset an order issued upon defective authority, *Frad v. Kelly*, 302 U. S. 312, a private litigant ordinarily may not. *Ball v. United States*, 140 U. S. 118, 128-129.

The rule does not obtain, of course, when the alleged defect of authority operates also as a limitation on this Court's appellate jurisdiction. *Ayrshire Collieries Corp. v. United States*, 331 U. S. 132 (three-judge court); *United States v. Emholt*, 105 U. S. 414 (certificate of divided opinion). In other circumstances as well, when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as "jurisdictional" and agreed to consider it on direct review even though not raised at the earliest practicable opportunity. *E. g., American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 387-388.

*A fortiori* is this so when the challenge is based upon nonfrivolous constitutional grounds. In *McDowell v.*

*United States* itself, *supra*, at 598-599, the Court, while holding that any defect in statutory authorization for a particular intracircuit assignment was immunized from examination by the *de facto* doctrine, specifically passed upon and upheld the constitutional authority of Congress to provide for such an assignment. And in *Lamar v. United States*, 241 U. S. 103, 117-118, the claim that an intercircuit assignment violated the criminal venue restrictions of the Sixth Amendment and usurped the presidential appointing power under Art. II, § 2, was heard here and determined upon its merits, despite the fact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review.

The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. See *O'Donoghue v. United States*, 289 U. S. 516, 532-534. It should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of *res judicata*, that there be an end to litigation. At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and that is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers. So this Court has concluded on an analogous balance struck to protect against intruding federal jurisdiction into the area constitutionally reserved to the States: Whether diversity of citizenship exists may be questioned on direct review for the first time in this Court. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382; *City of Gainesville v. Brown-Crummer Investment Co.*, 277 U. S. 54, 59. We hold that it is similarly open to these petitioners to challenge the constitutional authority of the judges below.

## II.

The Court of Appeals for the District of Columbia found it unnecessary to reach the question whether Judge Jackson enjoyed constitutional security of tenure and compensation. It held that even if he did not, Congress might authorize his assignment to courts in the District of Columbia, by virtue of its power "To exercise exclusive Legislation in all Cases whatsoever" over the District. Art. I, § 8, cl. 17. The Solicitor General, in support of that ruling, argues here that because the criminal charge against petitioner Lurk was violation of a local statute, D. C. Code, 1961, § 22-2901, rather than of one national in application, its trial did not require the assignment of an Article III judge.

The question thus raised is itself of constitutional dimension, and one which we need not reach if an Article III judge was in fact assigned. In the companion case, No. 242, the necessity for such a judge is uncontested. The Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants.<sup>8</sup> Authority for the Federal Government to decide questions of state law exists only by virtue of the Diversity Clause in Article III. *Erie R. Co. v. Tompkins*, 304 U. S. 64; see *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 284. For this reason, the question whether Judge Madden enjoyed constitutional independence is inescapably presented. Since decision of that question involves considerations bearing directly upon the constitutional status of Judge Jackson,

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<sup>8</sup> Under our limited writ of certiorari, 368 U. S. 814, we have no occasion to consider whether federal law was more appropriately the measure of the employer's obligation. Cf. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U. S. 95.

we deem it appropriate to dispose of both cases on the same grounds, without at present intimating any view as to the correctness of the holding below by the Court of Appeals for the District of Columbia.

### III.

The next question is whether the character of the judges who sat in these cases may be determined without reference to the character of the courts to which they were originally appointed. If it were plain that these judges were invested upon confirmation with Article III tenure and compensation, it would be unnecessary for present purposes to consider the constitutional status of the Court of Claims and the Court of Customs and Patent Appeals.

No such course, however, appears to be open. The statutes under which Judge Madden and Judge Jackson were appointed speak of service only on those courts. 28 U.S.C. §§ 171, 211. They were not, as were the judges selected for the late Commerce Court, appointed as "additional circuit judges," Act of June 18, 1910, c. 309, 36 Stat. 539, 540, whose tenure might be constitutionally secured regardless of the fortunes of their courts. See 50 Cong. Rec. 5409–5418 (1913); *Donegan v. Dyson*, 269 U. S. 49; Frankfurter and Landis, *The Business of the Supreme Court* (1927), 168–173. It is true that at the time of Judge Jackson's appointment there was in force a statute authorizing assignment of Court of Customs and Patent Appeals judges to serve on the courts of the District of Columbia. Act of September 14, 1922, c. 306, § 5, 42 Stat. 837, 839. At that time, however, before the *O'Donoghue* decision, there seems to have been a consensus that the courts of the District were not confined or protected by Article III; as late as 1930, this Court regarded it as "recognized that the courts of the District of Columbia are not created under the judiciary article

of the Constitution but are legislative courts . . . ." *Federal Radio Comm'n v. General Electric Co.*, 281 U. S. 464, 468; and see Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 899-903 (1930). The 1922 Act cannot therefore be viewed *ex proprio vigore* as conferring Article III status on judges subsequently appointed to the Court of Customs and Patent Appeals.<sup>9</sup>

A more novel suggestion is that the assignment statute itself, 28 U. S. C. §§ 291-296, authorized the Chief Justice to appoint inferior Article III judges in the course of designating them for service on Article III courts.<sup>10</sup> See Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities under the Constitution*, 28 Mich. L. Rev. 485 (1930); cf. *Ex parte Siebold*, 100 U. S. 371, 397-398; *Rice v. Ames*, 180 U. S. 371, 378. But we need not consider the constitutional questions involved in this suggestion, for the statute does not readily lend itself to such a construction. If nothing else, the authority given the Chief Justice in 28 U. S. C. § 295 to revoke assignments previously made is wholly inconsistent with a reading of the statute as empowering him to appoint inferior Article III judges. Judges assigned by the Chief Justice who are not previously endowed with constitu-

<sup>9</sup> The debates and reports in Congress display no awareness of the problem. See H. R. Rep. No. 1152, 67th Cong., 2d Sess. (1922); 62 Cong. Rec. 190-191, 207-209 (1921).

<sup>10</sup> Article II, § 2, cl. 2 of the Constitution provides that the President

"... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

tional security of tenure and compensation thus can gain nothing by the designation.<sup>11</sup>

It is significant that Congress did not enact the present broad assignment statute until after it had declared the Court of Claims and the Court of Customs and Patent Appeals to be constitutional courts. Act of August 25, 1958, 72 Stat. 848. A major purpose of these declarations was to eliminate uncertainty whether regular Article III judges might be assigned to assist in the business of those courts when disability or disqualification made it difficult for them to obtain a quorum.<sup>12</sup> Those doubts, suggested by dicta in *Ex parte Bakelite Corp.*, 279 U. S. 438, 460, would be expanded rather than allayed were we to hold that the judges of the Court of Claims and the Court of Customs and Patent Appeals enjoy the protections of Article III while leaving at large the status of those courts. For these various reasons, the constitutional quality of tenure and compensation extended Judges Madden and Jackson at the time of their confirmation must be deemed to have depended upon the constitutional status of the courts to which they were primarily appointed.

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<sup>11</sup> Compare the statute creating the Emergency Court of Appeals, to consist of three or more judges "designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals." Act of January 30, 1942, c. 26, § 204 (e), 56 Stat. 23, 32.

<sup>12</sup> Hearings on H. R. 1070 before Subcommittee No. 2 of the House Committee on the Judiciary, pp. 6-7, 24 (Unpublished, May 19, 1953; on file with the Clerk of the Committee) (testimony of Judge Howell of the Court of Claims); H. R. Rep. No. 695, 83d Cong., 1st Sess. 2, 5-6 (1953); S. Rep. No. 275, 83d Cong., 1st Sess. 2 (1953); H. R. Rep. No. 2349, 85th Cong., 2d Sess. (1958); S. Rep. No. 2309, 85th Cong., 2d Sess. (1958); 104 Cong. Rec. 16095 (1958) (remarks of Representative Keating).

## IV.

In determining the constitutional character of the Court of Claims and the Court of Customs and Patent Appeals, as we are thus led to do, we may not disregard Congress' declaration that they were created under Article III. Of course, Congress may not by fiat overturn the constitutional decisions of this Court, but the legislative history of the 1953 and 1958 declarations makes plain that it was far from attempting any such thing. Typical is a statement in the 1958 House Report that the purpose of the legislation was to "declare which of the powers Congress was intending to exercise when the court was created." H. R. Rep. No. 2349, 85th Cong., 2d Sess. 3 (1958); accord, H. R. Rep. No. 695, 83d Cong., 1st Sess. 3, 5, 7 (1953); and see S. Rep. No. 275, 83d Cong., 1st Sess. 2 (1953), substituted for S. Rep. No. 261, 83d Cong., 1st Sess. 2 (1953); 99 Cong. Rec. 8943, 8944 (1953) (remarks of Senator Gore).

"Subsequent legislation which declares the intent of an earlier law," this Court has noted, "is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction." *Federal Housing Administration v. The Darlington, Inc.*, 358 U. S. 84, 90; accord, *New York, P. & N. R. Co. v. Peninsula Exchange*, 240 U. S. 34, 39. Especially is this so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion. *United States v. Hutcheson*, 312 U. S. 219, 235-237. As examination of the House and Senate Reports makes evident, that is what occurred here. E. g., S. Rep. No. 2309, 85th Cong., 2d Sess. 2-3 (1958); H. R. Rep. No. 695, 83d Cong., 1st Sess. 3-5 (1953).

At the time when *Bakelite* and *Williams* were decided, the Court did not have the benefit of this congressional understanding. The *Williams* case, for example, arose under the Legislative Appropriation Act of June 30, 1932, c. 314, § 107 (a)(5), 47 Stat. 382, 402, which reduced the salary of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." Mr. Justice Sutherland, who wrote the Court's opinions in both *Williams* and *O'Donoghue*, was painfully disadvantaged by the absence of congressional intimation as to which judges of which courts were to be deemed exempted. See *O'Donoghue v. United States*, 289 U. S. 516, 529.

In the *Bakelite* case, to be sure, Mr. Justice Van Devanter said of an argument drawn from tenuous evidence of congressional understanding that it "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U. S., at 459. Yet he would hardly have denied that explicit evidence of legislative intent concerning the factors he thought controlling may be relevant and indeed highly persuasive. In any event, the *Bakelite* dictum did not embarrass the Court in deciding *O'Donoghue*, where it looked searchingly at "congressional practice" to determine what classification that body "recognizes." 289 U. S., at 548-550. We think the forthright statement of understanding embraced in the 1953 and 1958 declarations may be taken as similarly persuasive evidence for the problem now before us.

To give due weight to these congressional declarations is not of course to compromise the authority or responsibility of this Court as the ultimate expositor of the Constitution. The *Bakelite* and *Williams* decisions have

long been considered of questionable soundness. See, e. g., Brown, *The Rent in Our Judicial Armor*, 10 G. W. L. Rev. 127 (1941); Hart and Wechsler, *The Federal Courts and the Federal System* (1953), 348-351; 1 Moore, *Federal Practice* (2d ed. 1961), 71 n. 21. They stand uneasily next to *O'Donoghue*, much of whose reasoning in sustaining the Article III status of the District of Columbia superior courts seems applicable to the Court of Claims and the Court of Customs and Patent Appeals. In *Pope v. United States*, 323 U. S. 1, 13-14, where the Solicitor General argued at length against the continued vitality of *Bakelite* and *Williams*, their authority was regarded as an open question.

Furthermore, apart from this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases, e. g., *United States v. South Buffalo R. Co.*, 333 U. S. 771, 774-775; see *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405-408 and nn. 1-3 (Brandeis, J., dissenting), there is the fact that Congress has acted on its understanding and has provided for assignment of judges who have made decisions that are now said to be impeachable. In these circumstances, the practical consideration underlying the doctrine of *stare decisis*—protection of generated expectations—actually militates in favor of reexamining the decisions. We are well-advised, therefore, to regard the questions decided in those cases as entirely open to reconsideration.

## V.

The Constitution nowhere makes reference to "legislative courts." The power given Congress in Art. I, § 8, cl. 9, "To constitute Tribunals inferior to the supreme Court," plainly relates to the "inferior Courts" provided for in Art. III, § 1; it has never been relied on for establishment of any other tribunals.

The concept of a legislative court derives from the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511, dealing with courts established in a territory. A cargo of cotton salvaged from a wreck off the coast of Florida had been purchased by Canter at a judicial sale ordered by a court at Key West invested by the territorial legislature with jurisdiction over cases of salvage. The insurers, to whom the property in the cargo had been abandoned by the owners, brought a libel for restitution, claiming in part that the prior decree was void because not rendered in a court created by Congress, as required for the exercise of admiralty jurisdiction under Article III. Chief Justice Marshall for the Court swept this objection aside by noting that the Superior Courts of Florida, which had been created by Congress, were staffed with judges appointed for only four years, and concluded that Article III did not apply in the territories:

"These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." 1 Pet., at 546.

By these arresting observations the Chief Justice certainly did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. Elsewhere in the opinion he distinctly referred to the provisions of Article III to show that it was such a case. 1 Pet., at 545. All the Chief

Justice meant, and what the case has ever after been taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article;<sup>13</sup> courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

The reasons for this are not difficult to appreciate so long as the character of the early territories and some of the practical problems arising from their administration are kept in mind. The entire governmental responsibility in a territory where there was no state government to assume the burden of local regulation devolved upon the National Government. This meant that courts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State.<sup>14</sup> But when the territories began entering into statehood, as they soon did, the authority of the territorial courts

<sup>13</sup> Far from being "incapable of receiving" federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so. *Benner v. Porter*, 9 How. 235, 243; *Clinton v. Engelbrecht*, 13 Wall. 434, 447; *Reynolds v. United States*, 98 U. S. 145, 154; *United States v. Coe*, 155 U. S. 76, 86; *Balzac v. Porto Rico*, 258 U. S. 298, 312-313; *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U. S. 237, 240-241; cf. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 338; see *Pope v. United States*, 323 U. S. 1, 13-14.

<sup>14</sup> Under *Barber v. Barber*, 21 How. 582, 584, for example, the federal courts in the States were incompetent to render divorces; but in the territories, where the legislative power of the United States of necessity extended to all such local matters, the territorial courts took cognizance of them. *Simms v. Simms*, 175 U. S. 162, 167-168; *De la Rama v. De la Rama*, 201 U. S. 303.

over matters of state concern ceased; and in a time when the size of the federal judiciary was still relatively small, that left the National Government with a significant number of territorial judges on its hands and no place to put them. When Florida was admitted as a State, for example, Congress replaced three territorial courts of general jurisdiction comprising five judges with one Federal District Court and one judge.<sup>15</sup>

At the same time as the absence of a federal structure in the territories produced problems not foreseen by the Framers of Article III, the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by that article. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto.<sup>16</sup> The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States, and the freedom of the territories to dispense with protections deemed inherent in a separation of governmental powers was as fully recognized.<sup>17</sup>

Against this historical background, it is hardly surprising that Chief Justice Marshall decided as he did. It would have been doctrinaire in the extreme to deny the

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<sup>15</sup> *Benner v. Porter*, 9 How. 235, 240, 244. For statutory techniques since developed to avoid the interregnal problems involved in that case, see *Metlakatla Indian Community v. Egan*, 363 U. S. 555, 557-559; 1 Moore, *Federal Practice* (2d ed. 1961), 32-34.

<sup>16</sup> See *Clinton v. Englebrecht*, 13 Wall. 434, 441-445; *Hornbuckle v. Toombs*, 18 Wall. 648, 655-656.

<sup>17</sup> Compare *Clinton v. Englebrecht*, *supra*, 13 Wall., at 446, 447, with *Dreyer v. Illinois*, 187 U. S. 71, 83-84.

right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee of tenure that Congress could not put to use and that the exigencies of the territories did not require. Marshall chose neither course; conscious as ever of his responsibility to see the Constitution work, he recognized a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system.

The same confluence of practical considerations that dictated the result in *Canter* has governed the decision in later cases sanctioning the creation of other courts with judges of limited tenure. In *United States v. Coe*, 155 U. S. 76, 85-86, for example, the Court sustained the authority of the Court of Private Land Claims to adjudicate claims under treaties to land in the territories, but left it expressly open whether such a course might be followed within the States. The Choctaw and Chickasaw Citizenship Court was similarly created to determine questions of tribal membership relevant to property claims within Indian territory under the exclusive control of the National Government. See *Stephens v. Cherokee Nation*, 174 U. S. 445; *Ex parte Joins*, 191 U. S. 93; *Wallace v. Adams*, 204 U. S. 415. Upon like considerations, Article III has been viewed as inapplicable to courts created in unincorporated territories outside the mainland, *Downes v. Bidwell*, 182 U. S. 244, 266-267; *Balzac v. Porto Rico*, 258 U. S. 298, 312-313; cf. *Dorr v. United States*, 195 U. S. 138, 145, 149, and to the consular courts established by concessions from foreign countries, *In re Ross*, 140 U. S. 453, 464-465, 480.<sup>18</sup>

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<sup>18</sup> See generally, as to each of these courts, 1 Moore, Federal Practice (2d ed. 1961), 40-44, 47-50.

The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives. When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling. *O'Donoghue v. United States*, 289 U. S. 516, 536-539.

Since the conditions obtaining in one territory have been assumed to exist in each, this Court has in the past entertained a presumption that even those territorial judges who have been extended statutory assurances of life tenure and undiminished compensation have been so favored as a matter of legislative grace and not of constitutional compulsion. *McAllister v. United States*, 141 U. S. 174, 186.<sup>19</sup> By a parity of reasoning, however, the presumption should be reversed when Congress creates courts the continuing exercise of whose jurisdiction is unembarrassed by such practical difficulties. See *Mookini v. United States*, 303 U. S. 201, 205. As the *Bakelite* and *Williams* opinions recognize, the Court of Claims and the Court of Customs and Patent Appeals were created to carry into effect powers enjoyed by the National Government over subject matter—roughly, payment of debts and collection of customs revenue—and not over localities. What those opinions fail to deal with is whether that distinction deprives *American Insurance Co. v. Canter* of controlling force.

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<sup>19</sup> We do not now decide, of course, whether the same conditions still obtain in each of the present-day territories or whether, even if they do, Congress might not choose to establish an Article III court in one or more of them.

The *Bakelite* opinion did not inquire whether there might be such a distinction. After sketching the history of the territorial and consular courts, it continued at once:

"Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." 279 U. S., at 451.

Since in the Court's view the jurisdiction conferred on both the Court of Claims and the Court of Customs and Patent Appeals included "nothing which inherently or necessarily requires judicial determination,"<sup>20</sup> both could have been and were created as legislative courts.

We need not pause to assess the Court's characterization of the jurisdiction conferred on those courts, beyond indicating certain reservations about its accuracy.<sup>21</sup> Nor need we now explore the extent to which Congress may commit the execution of even "inherently" judicial business to tribunals other than Article III courts. We may and do assume, for present purposes, that none of the jurisdiction vested in our two courts is of that sort, so

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<sup>20</sup> *Ex parte Bakelite Corp.*, 279 U. S. 438, 453, 458; accord, *Williams v. United States*, 289 U. S. 553, 579.

<sup>21</sup> *Williams* itself recognized that the jurisdiction conferred on the Court of Claims by the Tucker Act, now 28 U. S. C. § 1491, to award just compensation for a governmental taking, empowered that court to decide what had previously been described as a judicial and not a legislative question. 289 U. S., at 581; see, e. g., *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327. As for *Bakelite*, its reliance, 279 U. S., at 458 n. 26, on *Cary v. Curtis*, 3 How. 236, for the proposition that disputes over customs duties may be adjudged summarily without recourse to judicial proceedings, appears to have overlooked the care with which that decision specifically declined to rule whether all right of action might be taken away from a protestant, even going so far as to suggest several judicial remedies that might have been available. See 3 How., at 250.

that all of it might be committed for final determination to non-Article III tribunals, be they denominated legislative courts or administrative agencies.

But because Congress may employ such tribunals assuredly does not mean that it must. This is the crucial *non sequitur* of the *Bakelite* and *Williams* opinions. Each assumed that because Congress might have assigned specified jurisdiction to an administrative agency, it must be deemed to have done so even though it assigned that jurisdiction to a tribunal having every appearance of a court and composed of judges enjoying statutory assurances of life tenure and undiminished compensation. In so doing, each appears to have misunderstood the thrust of the celebrated observation by Mr. Justice Curtis, that

“ . . . there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.” *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284.

This passage, cited in both the *Bakelite* and *Williams* opinions,<sup>22</sup> plainly did not mean that the matters referred to could not be entrusted to Article III courts. Quite the contrary, the explicit predicate to Justice Curtis' argument was that such courts could exercise judicial power over such cases. For the very statute whose authorization of summary distress proceedings was sustained in the *Murray* case, also authorized the distrainee to bring suit to arrest the levy against the United States in a Federal District Court. And as to this, the author of the opinion

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<sup>22</sup> 279 U. S., at 451 n. 8; 289 U. S., at 579.

stated, just before his more trenchant remark quoted above:

"The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court." <sup>23</sup>

Thus *Murray's Lessee*, far from furnishing authority against the proposition that the Court of Claims is a constitutional court, actually supports it.

To deny that Congress may create tribunals under Article III for the sole purpose of adjudicating matters that it might have reserved for legislative or executive decision would be to deprive it of the very choice that Mr. Justice Curtis insisted it enjoys. Of course possession of the choice, assuming it is coextensive with the range of matters confided to the courts,<sup>24</sup> subjects those courts to the continuous possibility that their entire jurisdiction may be withdrawn. See *Williams v. United States*, 289 U. S. 553, 580-581. But the threat thus facing their independence is not in kind or effect different from that sustained by all inferior federal courts. The great constitutional compromise that resulted in agreement upon Art. III, § 1, authorized but did not obligate Congress to create inferior federal courts. I Farrand, The Records of the Federal Convention (1911), 118, 124-125; The Federalist, No. 81 (Wright ed. 1961), at 509 (Hamilton). Once created, they passed almost a century without exercising any very significant jurisdiction. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 65-70 (1923); Frankfurter,

<sup>23</sup> 18 How., at 284.

<sup>24</sup> But see note 21, *supra*.

Distribution of Judicial Power Between United States and State Courts, 13 Cornell L. Q. 499 (1928). Throughout this period and beyond it up to today, they remained constantly subject to jurisdictional curtailment. *Turner v. Bank of North America*, 4 Dall. 8, 10 note (Chase, J.); *Cary v. Curtis*, 3 How. 236, 245; *Sheldon v. Sill*, 8 How. 441, 449; *Kline v. Burke Construction Co.*, 260 U. S. 226, 233-234. Even if it should be conceded that the Court of Claims or the Court of Customs and Patent Appeals is any more likely to be supplanted, we do not think the factor of constitutional significance.<sup>25</sup>

What has been said should suffice to demonstrate that whether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite. To ascertain whether the courts now under inquiry can meet those tests, we must turn to examine their history, the development of their functions, and their present characteristics.

## VI.

A. *Court of Claims*.—The Court of Claims was created by the Act of February 24, 1855, c. 122, 10 Stat. 612, primarily to relieve the pressure on Congress caused by the volume of private bills. As an innovation the court was at first regarded as an experiment, and some of its creators were reluctant to give it all the attributes of a court by making its judgments final; instead it was authorized to hear claims and report its findings of fact and opinions

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<sup>25</sup> See generally Hart and Wechsler, *The Federal Courts and the Federal System* (1953), 312-340, and more specifically, pp. 37-38, *infra*.

to Congress, together with drafts of bills designed to carry its recommendations into effect. § 7, 10 Stat. 613; see Cong. Globe, 33d Cong., 2d Sess. 70-72 (1854) (remarks of Senators Brodhead and Hunter). From the outset, however, a majority of the court's proponents insisted that its judges be given life tenure as a means of assuring independence of judgment, and their proposal won acceptance in the Act. § 1, 10 Stat. 612; see Cong. Globe, 33d Cong., 2d Sess. 71, 108-109 (Senator Hunter); 72 (Senator Clayton); 106 (Senator Brodhead); 110 (Senator Pratt); 114, 902 (the votes). Indeed there are substantial indications in the debates that Congress thought it was establishing a court under Article III. Cong. Globe, 33d Cong., 2d Sess. 108-109 (Senator Hunter); 110-111 (Senator Pratt); 111 (Senator Clayton); 113 (Senators Stuart and Douglas).

By the end of 1861, however, it was apparent that the limited powers conferred on the court were insufficient to relieve Congress from the laborious necessity of examining the merits of private bills. In his State of the Union message that year, President Lincoln recommended that the legislative design to provide for the independent adjudication of claims against the United States be brought to fruition by making the judgments of the Court of Claims final. The pertinent text of his address is as follows, Cong. Globe, 37th Cong., 2d Sess., Appendix, p. 2:

"It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department . . . . It was intended by the organization of the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable

means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final."

By the Act of March 3, 1863, c. 92, § 5, 12 Stat. 765, 766, Congress adopted the President's recommendation and made the court's judgments final, with appeal to the Supreme Court provided in certain cases. The significance of this nearly contemporaneous enactment for the light it sheds on the aims of the 1855 Congress is apparent.

There was one further impediment. Section 14 of the 1863 Act, 12 Stat. 768, provided that "no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." In *Gordon v. United States*, 2 Wall. 561, this Court refused to review a judgment of the Court of Claims because it construed that section as giving the Secretary a revisory authority over the court inconsistent with its exercise of judicial power. Congress promptly repealed the offensive section, Act of March 17, 1866, c. 19, § 1, 14 Stat. 9, once again exhibiting its purpose to liberate the Court of Claims from itself and the Executive. Thereafter, the Supreme Court promulgated rules governing appeals from the court, 3 Wall. vii-viii, and took jurisdiction under them for the first time in *DeGroot v. United States*, 5 Wall. 419.

The early appeals entertained by the Court furnish striking evidence of its understanding that the Court of Claims had been vested with judicial power. In *DeGroot* the court had been given jurisdiction by special bill only after the passage of two private bills had failed to produce agreement by administrative officials upon adequate recompense. This Court was thus presented with a vivid illustration of the ways in which the same matter might be submitted for resolution to a legislative committee, to

an executive officer, or to a court, *Murray's Lessee, supra*, and nevertheless accepted appellate jurisdiction over what was, necessarily, an exercise of the judicial power which alone it may review. *Marbury v. Madison*, 1 Cranch 137, 174-175.

After the repeal of § 14, the Court was quick to protect the Court of Claims' judgments from executive revision. In *United States v. O'Grady*, 22 Wall. 641, a judgment had been diminished by the Secretary of the Treasury in an amount equal to a tax assertedly due, although the United States had not pleaded a set-off as it was entitled by the 1863 Act to do.<sup>26</sup> The Court of Claims and this Court on appeal held the deduction unwarranted in law, with the following pertinent closing observation:

"Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for a new trial."<sup>27</sup>

Like views abound in the early reports. In *United States v. Union Pacific R. Co.*, 98 U. S. 569, 603, for example, referring to Article III, the Court said:

"Congress has, under this authority, created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution."

<sup>26</sup> § 3, 12 Stat. 765, now 28 U. S. C. § 1503. See also 18 Stat. 481 (1875), as amended, 31 U. S. C. § 227, requiring the Comptroller General to bring suit against a nonconsenting judgment creditor if that official believes a debt not previously asserted as a set-off is due the United States.

<sup>27</sup> 22 Wall., at 648.

Such remained the view of the Court as late as *Miles v. Graham*, 268 U. S. 501, decided in 1925. There it was held, on the authority of *Evans v. Gore*, 253 U. S. 245, that the salary of a Court of Claims judge appointed even after enactment of the taxing statute in question was not subject to such diminution. Although the case was afterwards overruled on this point, *O'Malley v. Woodrough*, 307 U. S. 277, 283, what is of continuing interest is the Court's reliance in *Miles* upon *Evans v. Gore*, where Mr. Justice Van Devanter for the Court devoted six full pages to recitation of the importance of the guarantees of tenure and salary contained in Article III.<sup>28</sup> How it was possible to say in *Bakelite*, 279 U. S., at 455, that the Court in *Miles*, decided only five years after *Evans* and with copious quotation from it, was unaware of the crucial question whether Article III extended its protection to a judge of the Court of Claims, is very difficult to understand.

In actuality, the Court's pre-*Bakelite* view of the Court of Claims is supported by the evidence of increasing confidence placed in that tribunal by Congress. The Tucker Act, § 1, 24 Stat. 505 (1887), now 28 U. S. C. § 1491, greatly expanded the jurisdiction of the court by authorizing it to adjudicate

"All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable . . . ."

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<sup>28</sup> *Evans v. Gore*, 253 U. S. 245, 248-254.

All of the cases within this grant of jurisdiction arise either immediately or potentially under federal law within the meaning of Art. III, § 2. *Osborn v. Bank of the United States*, 9 Wheat. 738, 818-819, 823-825; see *Clearfield Trust Co. v. United States*, 318 U. S. 363; *Federal Crop Insurance Corp. v. Merrill*, 332 U. S. 380; Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 184-196. The cases heard by the Court have been as intricate and far-ranging as any coming within the federal-question jurisdiction, 28 U. S. C. § 1331, of the District Courts. E. g., *Causby v. United States*, 104 Ct. Cls. 342, 60 F. Supp. 751, remanded for further findings, 328 U. S. 256 (eminent domain); *Lovett v. United States*, 104 Ct. Cls. 557, 66 F. Supp. 142, aff'd, 328 U. S. 303 (bill of attainder); *Shapiro v. United States*, 107 Ct. Cls. 650, 69 F. Supp. 205 (military due process). In none of these cases, nor in others, could it well be suggested that the Court of Claims had adjudged the issues, no matter how important to the Government, otherwise than dispassionately.

Indeed there is reason to believe that the Court of Claims has been constituted as it is precisely to the end that there may be a tribunal specially qualified to hold the Government to strict legal accounting. From the beginning it has been given jurisdiction only to award damages, not specific relief. *United States v. Alire*, 6 Wall. 573; *United States v. Jones*, 131 U. S. 1; see Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 123-126. No question can be raised of Congress' freedom, consistently with Article III, to impose such a limitation upon the remedial powers of a federal court. *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 330 (Norris-LaGuardia Act). But far from serving as a restriction, this limitation has allowed the Court of Claims a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action. See

*Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 703-704; *Malone v. Bowdoin*, 369 U. S. 643; Brenner, Judicial Review by Money Judgment in the Court of Claims, 21 Fed. B. J. 179 (1961).

"If there are such things as political axioms," said Alexander Hamilton, "the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number." *The Federalist*, No. 80 (Wright ed. 1961), at 500. His sentiments were not ignored by the Framers of Article III. The Randolph plan, which formed the basis of that article, called for establishment of a national judiciary coextensive in authority with the executive and legislative branches. IV Farrand, *The Records of the Federal Convention* (rev. ed. 1937), 47-48. For, as Hamilton observed, a chief defect of the Confederation had been ". . . the want of a judiciary power. Laws are a dead letter without courts to expound and define their meaning and operation." *The Federalist*, No. 22 (Wright ed. 1961), at 197. But because of the barrier of sovereign immunity, the laws controlling governmental rights and obligations could not for years obtain a fully definitive exposition. The creation of the Court of Claims can be viewed as a fulfillment of the design of Article III.

B. *The Court of Customs and Patent Appeals*.—The Court of Customs Appeals, as it was first known, was established by the Payne-Aldrich Tariff Act of August 5, 1909, c. 6, § 29, 36 Stat. 11, 105, to review by appeal final decisions of the Board of General Appraisers (now Customs Court) respecting the classification and rate of duty applicable to imported merchandise. The Act was silent about the tenure of the judges, as had been the Judiciary Act of 1789, c. 20, §§ 3, 4, 1 Stat. 73-75. The salary, first set at \$10,000, was afterwards lowered to the \$7,000 then being paid to circuit judges, Act of February 25, 1910, c. 62, § 1, 36 Stat. 202, 214, but before the first nomina-

tions had been received or confirmed, see 45 Cong. Rec. 2959, 4003 (1910); and, although it has since been increased, it has never been diminished.<sup>29</sup> After the *Bakelite* case had been decided, Congress expressly conferred tenure during good behavior upon the court's judges, in the Tariff Act of 1930, § 646, 46 Stat. 590, 762. Representative Chindblom, in supporting the measure, stated that "when this court was established it was believed to be a constitutional court [so] that it was not necessary to fix the term." 71 Cong. Rec. 2043 (1929).

The debates in the Senate at the time of the court's creation bear out this observation. See 44 Cong. Rec. 4185-4225 (1909). For under the Customs Administrative Act of 1890, c. 407, § 15, 26 Stat. 131, 138, review of decisions of the Board of General Appraisers had been vested in the Circuit Courts, undoubted Article III courts; it was this jurisdiction that was proposed to be transferred to the new court.<sup>30</sup> The debates accordingly concerned themselves with whether there was a need for

<sup>29</sup> Under the Legislative Appropriation Act of June 30, 1932, c. 314, 47 Stat. 382—the statute under which the *Williams* and *O'Donoghue* cases arose—the judges of the Court of Customs and Patent Appeals accepted a reduction in salary from \$12,500 to \$10,000. That court had not, however, been specified for reduction by Congress; the action of the judges was understandable coming as it did after *Bakelite* had been decided; and under § 109 of the Act, 47 Stat. 403, the Treasury was authorized to accept reductions in payment voluntarily tendered by judges whose salary was constitutionally exempt from diminution.

<sup>30</sup> 36 Stat. 106. Provision was made for the transfer of pending cases and of appeals from final decisions in and of the Circuit Courts and Courts of Appeals. 36 Stat. 106, 107. The very first case heard by the Court of Customs Appeals was an appeal from the Circuit Court for the Southern District of New York. *Hansen v. United States*, 1 Ct. Cust. App. 1; it also took jurisdiction of a case transferred from the Court of Appeals for the Ninth Circuit in *United States v. Seattle Brewing & Malting Co.*, 1 Ct. Cust. App. 362.

a specialized court in the federal judicial system to deal with customs matters.

As was said some 35 years ago, "an important phase of the history of the federal judiciary deals with the movement for the establishment of tribunals whose business was to be limited to litigation arising from a restricted field of legislative control." Frankfurter and Landis, *The Business of the Supreme Court* (1927), 147. In certain areas of federal judicial business there has been a felt need to obtain, *first*, the special competence in complex, technical and important matters that comes from narrowly focused inquiry; *second*, the speedy resolution of controversies available on a docket unencumbered by other matters; and, *third*, the certainty and definition that come from nationwide uniformity of decision. See generally *id.*, at 146-186. Needs such as these provoked formation of the Commerce Court and the Emergency Court of Appeals. They also prompted establishment of the Court of Customs and Patent Appeals and its investiture with jurisdiction over customs, tariff, and patent and trademark litigation. 28 U. S. C. §§ 1541-1543.

The parallelism with the Commerce Court is especially striking. That court was created to exercise the jurisdiction previously held by the Circuit Courts to review orders of the Interstate Commerce Commission. Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 539. It was needed, so its sponsors believed, to afford uniform, expert, and expeditious judicial review. See President Taft's message to Congress, 45 Cong. Rec. 379 (1910), in the course of which he stated:

"Reasons precisely analogous to those which induced the Congress to create the court of customs appeals by the provisions in the tariff act of August 5, 1909, may be urged in support of the creation of the commerce court."

When disfavor with the court caused its abolition three years later, Act of October 22, 1913, c. 32, 38 Stat. 208, 219, it was decided in Congress after extensive debate that the judges then serving on it were protected in tenure by Article III, and they were thereafter assigned to sit on other constitutional courts. See, e.g., 48 Cong. Rec. 7994 (1912) (remarks of Senator Sutherland); and see *Donegan v. Dyson*, 269 U. S. 49.

The Emergency Court of Appeals was similarly created, by the Act of January 30, 1942, c. 26, 56 Stat. 23, to exercise exclusive equity jurisdiction to determine the validity of regulations, price schedules, and orders issued by the wartime Office of Price Administration.<sup>31</sup> Its Article III status was recognized in *Lockerty v. Phillips*, 319 U. S. 182, 187-188.

Of course the judges of those courts were appointed as judges of inferior federal courts generally, or drawn from among those previously appointed as such. See p. 8 and note 11, *supra*. But by 1942 at least, when the latter court was created, Congress was well aware of the doubt created by the *Bakelite* and *Williams* decisions whether Article III judges could sit on non-Article III tribunals. Its action in authorizing judges of the District Courts and Courts of Appeal to sit on the Emergency Court thus reflects its understanding that that court was being created under Article III.

Such an understanding parallels that of previous Congresses since the adoption of the Constitution. Congress has never been compelled to vest the entire jurisdiction provided for in Article III upon inferior courts of its cre-

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<sup>31</sup> Its functions were continued under the Defense Production Act of 1950, c. 932, § 408, 64 Stat. 798, 808, to determine the validity of price and wage stabilization orders issued under that Act. As of the latest bound volume of the Federal Reporter, 298 F. 2d xviii (1962), it is still in business clearing up its docket.

ation; until 1875 it conferred very little of it indeed. See pp. 21-22, *supra*. The Court of Customs and Patent Appeals therefore fits harmoniously into the federal judicial system authorized by Article III.

## VII.

Article III, § 2 provides in part:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . — to Controversies to which the United States shall be a Party . . . ."

The cases heard by the Court of Claims and the Court of Customs and Patent Appeals all arise under federal law, as we have seen; they are also cases in which the United States is a party. But in *Williams v. United States*, 289 U. S. 553, 572-578, far from making of that circumstance a further proof that the Court of Claims exercises the judicial power contemplated by Article III, this Court held that it did not because that article, so it was said, does not make justiciable controversies to which the United States is a party *defendant*.

The Court's opinion dwelt in part upon the omission of the word "all" before "Controversies" in the clause referred to. To derive controlling significance from this semantic circumstance seems hardly to be faithful to John Marshall's admonition that "it is a constitution we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407. But it would be needlessly literal to suppose that the Court rested its holding on this point. Rather it deemed controlling the rule, "well settled and understood" at the time of the Constitutional Convention, that "the sovereign power is immune from suit." 289 U. S., at 573.

Accordingly it becomes necessary to reconsider whether that principle has the effect claimed of rendering suits against the United States nonjusticiable in a court created under Article III.

At least one touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be maintained is of a sort "recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems." *United Steelworkers v. United States*, 361 U. S. 39, 44, 60 (FRANKFURTER, J., concurring). There can be little doubt that that test is met here. Suits against the English sovereign by petition of liberate, *monstrans de droit*, and other forms of action designed to gain redress against unlawful action of the Crown had been developed over several centuries and were well-established before the Revolution. See 9 Holdsworth, History of English Law, 7-45 (1926). Similar provisions for judicial remedies against themselves were made by the American States immediately after the Revolution. *E. g.*, 9 Laws of Va. 536, 540 (1778) (Hening 1821); see *Higginbotham's Executrix v. Commonwealth*, 25 Gratt. 627, 637-638 (Va. 1875). This history was known by Congress when it established the Court of Claims, see Cong. Globe, 33d Cong., 2d Sess. 73 (1854) (remarks of Senator Pettit), and undoubtedly was familiar to the Framers of the Constitution, most of them lawyers.

Hamilton's views, quoted in the *Williams* case, 289 U. S., at 576, are not to the contrary. To be sure, Hamilton argued that "the contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will." The Federalist, No. 81 (Wright ed. 1961), at 511. But that is because there was no surrender of

sovereign immunity in the plan of the convention;<sup>32</sup> so that, for suits against the United States, it remained "inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*" *Ibid.* (emphasis in original). In this sense, and only in this sense, is Article III's extension of judicial competence over controversies to which the United States is a party ineffective to confer jurisdiction over suits to which it is a defendant. For "behind the words of the constitutional provisions are postulates which limit and control." *Monaco v. Mississippi*, 292 U. S. 313, 322. But once the consent is given, the postulate is satisfied, and there remains no barrier to justiciability. Cf. *Cohens v. Virginia*, 6 Wheat. 264, 383-385.

So the Court had given itself to understand before *Williams* was decided. In *United States v. Louisiana*, 123 U. S. 32, 35, it held maintainable under Article III a suit brought in the Court of Claims by a State against the United States with Congress' consent. And in *Minnesota v. Hitchcock*, 185 U. S. 373, 384, which reaffirmed that ruling, the Court said:

"This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant."

Further in the same opinion, 185 U. S., at 386, the Court significantly remarked:

"While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United

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<sup>32</sup> As there was, for example, in suits between States and by the United States against a State. *Rhode Island v. Massachusetts*, 12 Pet. 657, 720; *United States v. Texas*, 143 U. S. 621, 639-646.

States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition."

To deny that proposition now would be to call into question a large measure of the jurisdiction exercised by the United States District Courts. Under the Federal Tort Claims Act, § 410 (a), 60 Stat. 842, 843-844 (1946), as amended, 28 U. S. C. § 1346 (b), those courts have been empowered to determine the tort liability of the United States in suits brought by individual plaintiffs. In so doing, they exercise functions akin to those of the Court of Claims, as is evidenced by the statutory authorization of appeals to that court from their judgments, with the consent of the appellee. § 412 (a)(2), 60 Stat. 844-845 (1946), as amended, 28 U. S. C. § 1504.

In truth the District Courts have long been vested with substantial portions of the identical jurisdiction exercised by the Court of Claims. The Tucker Act, § 2, 24 Stat. 505 (1887), as amended, 28 U. S. C. § 1346 (a)(2), gives them concurrent jurisdiction over the suits it authorizes, when the amount in controversy is less than \$10,000. Under that Act a District Court sits "as a court of claims," *United States v. Sherwood*, 312 U. S. 584, 591, and affords the same rights and privileges to suitors against the United States. *Bates Manufacturing Co. v. United States*, 303 U. S. 567, 571. See generally Schwartz and Jacoby, *Government Litigation* (tentative ed. 1960), 109-111.

There have been and are further statutory indications that Congress regards the two courts interchangeably. In 1921, Mr. Justice Brandeis compiled a list of 17 statutes passed during World War I, permitting suit against the United States for the value of property seized for use in the war effort, and authorizing them to be instituted in either the Court of Claims or one of the District Courts.

*United States v. Pfitsch*, 256 U. S. 547, 553 n. 1. Today, 28 U. S. C. § 1500 gives litigants an election to sue the United States as principal in the Court of Claims or to pursue their claims against its agents in any other court, including the District Courts. See *National Cored Forgings Co. v. United States*, 132 Ct. Cls. 11, 132 F. Supp. 454. In addition, by the Act of September 13, 1960, §§ 1, 2 (a), 74 Stat. 912, Congress added §§ 1406 (c) and 1506 to Title 28 of the United States Code, providing for transfer between the Court of Claims and any District Court when a suit within one court's exclusive jurisdiction is brought mistakenly in another.

These evidences of congressional understanding that suits against the United States are justiciable in courts created under Article III may not be lightly disregarded. Nevertheless it is probably true that Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court. It remains to consider whether that circumstance suffices to render non-judicial the decision of claims against the United States in the Court of Claims.

*First*. Throughout its history the Court of Claims has frequently been given jurisdiction by special act to award recovery for breach of what would have been, on the part of an individual, at most a moral obligation. *E. g.*, 45 Stat. 602 (1928), as amended, 25 U. S. C. §§ 651-657; *Indians of California v. United States*, 98 Ct. Cls. 583, 599. Congress has waived the benefit of *res judicata*, *Cherokee Nation v. United States*, 270 U. S. 476, 486, and of defenses based on the passage of time, *United States v. Alcea Band of Tillamooks*, 329 U. S. 40, 45-46; *United States v. Central Eureka Mining Co.*, 357 U. S. 155.

In doing so, as this Court has uniformly held, Congress has enlisted the aid of judicial power whose exercise is amenable to appellate review here. *United States v.*

*Alcea Band of Tillamooks, supra*; see *Colgate v. United States*, 280 U. S. 43, 47-48. Indeed the Court has held that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted constitutional court. *United States v. Realty Co.*, 163 U. S. 427.

The issue was settled beyond peradventure in *Pope v. United States*, 323 U. S. 1. There the Court held that for Congress to direct the Court of Claims to entertain a claim theretofore barred for any legal reason from recovery—as, for instance, by the statute of limitations, or because the contract had been drafted to exclude such claims—was to invoke the use of judicial power, notwithstanding that the task might involve no more than computation of the sum due. Consent judgments, the Court recalled, are nonetheless judicial judgments. See 323 U. S., at 12, and cases cited. After this decision it cannot be doubted that when Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function.

*Second.* Congress has on occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this Court. *E. g., District of Columbia v. Eslin*, 183 U. S. 62. But that is not incompatible with the possession of Article III judicial power by the tribunal affected. Congress has consistently with that article withdrawn the jurisdiction of this Court to proceed with a case then *sub judice*, *Ex parte McCordle*, 7 Wall. 506; its power can be no less when dealing with an inferior federal court, *In re Hall*, 167 U. S. 38, 42. For as Hamilton assured those of his contemporaries who were concerned about the reach of power that might be vested in a federal judiciary, "it ought to be recollect that the

national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove [any] . . . inconveniences." *The Federalist*, No. 80 (Wright ed. 1961), at 505.

The authority is not, of course, unlimited. In 1870, Congress purported to withdraw jurisdiction from the Court of Claims and from this Court on appeal over cases seeking indemnification for property captured during the Civil War, so far as eligibility therefor might be predicated upon an amnesty awarded by the President, as both courts had previously held that it might. Despite *Ex parte McCardle* *supra*, the Court refused to apply the statute to a case in which the claimant had already been adjudged entitled to recover by the Court of Claims, calling it an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case. *United States v. Klein*, 13 Wall. 128. Surely no such concern would have been manifested if it had not been thought that the Court of Claims was invested with judicial power.<sup>33</sup>

## VIII.

A more substantial question relating to the justiciability of money claims against the United States arises from the impotence of a court to enforce its judgments.

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<sup>33</sup> *Pocono Pines Assembly Hotels Co. v. United States*, 73 Ct. Cls. 447, leave to file petition for writ of mandamus or prohibition denied, 285 U. S. 526, in which the Congress "remanded" a final and unappealed decision against the United States to the Court of Claims for new findings, does not detract from the authority of *Klein*. Without examining anything else, it is enough to note that the considerations governing a grant or denial of a petition for mandamus are, like those controlling the issuance of a writ of certiorari, so discretionary with the Court as to deprive a denial of precedential effect on this score. Compare Sup. Ct. Rule 30, with Rule 19 (1), (2), and cf. *Brown v. Allen*, 344 U. S. 443, 488, 491-492 (opinion of FRANKFURTER, J.).

It was Chief Justice Taney's opinion, in *Gordon v. United States*, afterwards published at 117 U. S. 697, 702, that the dependence of the Court of Claims upon an appropriation by Congress to carry its awards into effect negatived the possession of judicial power:

"The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power."

But Taney's opinion was not the opinion of the Court. It was a memorandum of his views prepared before his death and circulated among, but not adopted by, his brethren. The opinion of the Court, correctly reported for the first time in *United States v. Jones*, 119 U. S. 477, 478, makes clear that its refusal to entertain the *Gordon* appeal rested solely on the revisory authority vested in the Secretary of the Treasury before the repeal of § 14. See also *United States v. Alire*, 6 Wall. 573, 576; *United States v. O'Grady*, 22 Wall. 641, 647; *Langford v. United States*, 101 U. S. 341, 344-345—in each of which the limitation of the *Gordon* decision to the difficulties caused by § 14 clearly appears.

Nevertheless the problem remains and should be considered. Its scope has, however, been reduced by the Act of July 27, 1956, § 1302, 70 Stat. 678, 694, 31 U. S. C. § 724a, a general appropriation act which eliminates the need for subsequent separate appropriations to pay judgments below \$100,000. A judgment creditor of this order simply files in the General Accounting Office a certificate of the judgment signed by the clerk and the chief judge of the Court of Claims, and is paid. 28 U. S. C. § 2517 (a). For judgments of this dimension, therefore, there need be no concern about the issuance of execution.

For claims in excess of \$100,000, 28 U. S. C. § 2518 directs the Secretary of the Treasury to certify them to Congress once review in this Court has been foregone or sought and found unavailing. This, then, is the domain

of our problem, for Art. I, § 9, cl. 7, vests exclusive responsibility for appropriations in Congress,<sup>34</sup> and the Court early held that no execution may issue directed to the Secretary of the Treasury until such an appropriation has been made. *Reeside v. Walker*, 11 How. 272, 291.

The problem was recognized in the Congress that created the Court of Claims, where it was pointed out that if ability to enforce judgments were made a criterion of judicial power, no tribunal created under Article III would be able to assume jurisdiction of money claims against the United States. Cong. Globe, 33d Cong., 2d Sess. 113 (1854) (remarks of Senator Stuart). The subsequent vesting of such jurisdiction in the District Courts, pp. 35-36, *supra*, of course bears witness that at least the Congress has not thought such a criterion imperative.

Ever since Congress first accorded finality to judgments of the Court of Claims, it has sought to avoid interfering with their collection. Section 7 of the Act of March 3, 1863, 12 Stat. 765, 766, provided for the payment of final judgments out of general appropriations. In 1877, Congress shifted for a time to appropriating lump sums for judgments certified to it by the Secretary of the Treasury, not in order to question the judgments but to avoid the possibility that a large judgment might exhaust the prior appropriation. Act of March 3, 1877, c. 105, 19 Stat. 344, 347; see 6 Cong. Rec. 585-588 (1877). A study concluded in 1933 found only 15 instances in 70 years when Congress had refused to pay a judgment. Note, 46 Harv. L. Rev. 677, 685-686 n. 63. This historical record, surely more favorable to prevailing parties than that obtaining in private litigation, may well make us doubt whether the capacity to enforce a judgment is always indispensable for the exercise of judicial power.

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<sup>34</sup> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."

The Court did not think so in *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 461-462, where the issue was the justiciability under Article III of a declaratory judgment action brought by the United States in the Court of Claims to determine its liability for payment of an award procured by the defendant from an international arbitral commission assertedly through fraud. See also *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 263. Nor has it thought so when faced with the exactly analogous problem presented by suits for money between States in the original jurisdiction. That jurisdiction has been upheld, for example, in *South Dakota v. North Carolina*, 192 U. S. 286, 318-321, notwithstanding the Court's recognition of judicial impotence to compel a levy of taxes or otherwise by process to enforce its award. See especially the opinions of Chief Justice Fuller and Chief Justice White at the beginning and inconclusive end of the extended litigation between Virginia and West Virginia, 206 U. S. 290, 319 (1907) and 246 U. S. 565 (1918), in which the Court asserted jurisdiction to award damages for breach of contract despite persistent and never-surmounted challenges to its power to enforce a decree.<sup>35</sup> If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States. We conclude that the presence of the United States as a party defendant to suits maintained in the Court of Claims and the Court of Customs and Patent Appeals does not debar those courts from exercising the judicial power provided for in Article III.

<sup>35</sup> See also the intervening opinions and dispositions: 209 U. S. 514; 220 U. S. 1, 36; 222 U. S. 17, 19-20; 231 U. S. 89; 234 U. S. 117; 238 U. S. 202; 241 U. S. 531.

## IX.

All of the business that comes before the two courts is susceptible of disposition in a judicial manner. What remains to be determined is the extent to which it is in fact disposed of in that manner.

A preliminary consideration that need not detain us long is the absence of provision for jury trial of counter-claims by the Government in actions before the Court of Claims. Despite dictum to the contrary in *United States v. Sherwood*, 312 U. S. 584, 587, the legitimacy of that nonjury mode of trial does not depend upon the supposed "legislative" character of the court. It derives instead, as indeed was also noted in *Sherwood, ibid.*, from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not "suits at common law" within the meaning of the Seventh Amendment. *McElrath v. United States*, 102 U. S. 426, 439-440. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. Cf. *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211; see 74 Harv. L. Rev. 414, 415 (1960).<sup>36</sup>

The principal question raised by the parties under this head of the argument is whether the matters referred by Congress to the Court of Claims and the Court of Customs and Patent Appeals are submitted to them in a form consonant with the limitation of judicial power to "cases or

<sup>36</sup> The provision in 28 U. S. C. § 2503 for Commissioners to take evidence and make preliminary rulings is conformable in all respects with the practice of masters in chancery. For the judicial quality of the proceedings, see the Revised Rules of the Court of Claims, effective December 2, 1957, 140 Ct. Cls. ii, 28 U. S. C. App., p. 5237, as amended, *id.* (Supp. III), p. 863.

controversies" imposed by Article III. We may consider first the bulk of jurisdiction exercised by the two courts, reserving for separate treatment in the next section of this opinion two areas which may reasonably be regarded as presenting special difficulty.

"Whether a proceeding which results in a grant is a judicial one," said Mr. Justice Brandeis for a unanimous Court, "does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. It may give to the individual the option of either an administrative or a legal remedy. Or it may provide only a legal remedy. [See pp. 19-22, *supra*]. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." *Tutun v. United States*, 270 U. S. 568, 576-577. (Citations omitted.)

It is unquestioned that the Tucker Act cases assigned to the Court of Claims, 28 U. S. C. § 1491, advance to judgment "according to the regular course of legal procedure." Under this grant of jurisdiction the court hears tax cases, cases calling into question the statutory authority for a regulation, controversies over the existence or extent of a contractual obligation, and the like. See generally Schwartz and Jacoby, *Government Litigation* (tentative ed. 1960), 131-223. Such cases, which account for as much as 95% of the court's work,<sup>37</sup> form the staple judi-

<sup>37</sup> In 1950, Tucker Act cases constituted 2,350 of the 2,472 proceedings conducted by the court. Wilkinson, *The United States Court of Clairs*, 36 A. B. A. J. 89, 159 (1950). The percentage may

cial fare of the regular federal courts. There can be no doubt that, to the "expert feel of lawyers," *United Steelworkers v. United States*, 361 U. S. 39, 44, 60 (FRANKFURTER, J., concurring), they constitute cases or controversies.

The balance of the court's jurisdiction to render final judgments may likewise be assimilated to the traditional business of courts generally. Thus the court has been empowered to render accountings,<sup>38</sup> to decide if debts<sup>39</sup> or penalties<sup>40</sup> are due the United States, and to determine the liability of the United States for patent or copyright infringement<sup>41</sup> and for other specially designated torts.<sup>42</sup> In addition, it has been given jurisdiction to review, on issues of law including the existence of substantial evidence, decisions of the Indian Claims Commission.<sup>43</sup> Each of these cases, like those under the Tucker Act, is contested, is concrete, and admits of a decree of a sufficiently conclusive character. See *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 240-241.

The same may undoubtedly be said of the customs jurisdiction vested in the Court of Customs and Patent Appeals by 28 U. S. C. § 1541.<sup>44</sup> Contests over classifi-

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well have been augmented since that time by the extension of Tucker Act jurisdiction to Indian claims accruing after August 13, 1946. 28 U. S. C. § 1505, added by 63 Stat. 102 (1949).

<sup>38</sup> 28 U. S. C. § 1494 (contractors or their sureties); 28 U. S. C. §§ 1496, 2512 (disbursing officers).

<sup>39</sup> R. S. § 5261 (1878), as amended, 45 U. S. C. § 87 (Government-aided railroads).

<sup>40</sup> 28 U. S. C. § 1499 (violations of the Eight-Hour Law, 37 Stat. 137 (1912), as amended, 40 U. S. C. § 324).

<sup>41</sup> 28 U. S. C. (Supp. III) § 1498.

<sup>42</sup> 28 U. S. C. §§ 1495, 2513 (wrongful imprisonment); 28 U. S. C. § 1497 (trespass to oyster beds).

<sup>43</sup> 60 Stat. 1049, 1054 (1946), 25 U. S. C. § 70s.

<sup>44</sup> 42 Stat. 15 (1921), as amended, 19 U. S. C. § 169, makes 28 U. S. C. § 1541 applicable as well to the antidumping statute. See also 46 Stat. 735 (1930), as amended, 19 U. S. C. § 1516 (b), (c),

cation and valuation of imported merchandise have long been maintainable in inferior federal courts. Under R. S. § 3011 (1878), suits after protest against the collector were authorized in the circuit courts. *E. g., Greeley's Administrator v. Burgess*, 18 How. 413; *Iasigi v. The Collector*, 1 Wall. 375. When the Customs Administrative Act of 1890 was passed, c. 407, 26 Stat. 131, repealing that section and creating a Board of General Appraisers to review determinations of the collector, a further right of review was provided in the Circuit Courts. See *DeLima v. Bidwell*, 182 U. S. 1, 175. This Court took unquestioned appellate jurisdiction from those courts on numerous occasions. *E. g., United States v. Ballin*, 144 U. S. 1; *Hoeninghaus v. United States*, 172 U. S. 622. It has continued to accept review by certiorari from the Court of Customs Appeals since the jurisdiction of the Circuit Courts was transferred to it in 1909. *E. g., Five Per Cent Discount Cases*, 243 U. S. 97; *Barr v. United States*, 324 U. S. 83. That the customs litigation authorized by § 1541 conforms to conventional notions of case or controversy seems no longer open to doubt.

Doubt has been expressed, however, about the jurisdiction conferred by 28 U. S. C. § 1542 and 60 Stat. 435 (1946), as amended, 15 U. S. C. § 1071, to review application and interference proceedings in the Patent Office relative to patents and trademarks. Parties to those proceedings are given an election to bring a civil action to contest the Patent Office decision in a District Court under 35 U. S. C. §§ 145, 146, or to seek review in the Court of Customs and Patent Appeals under 35 U. S. C. § 141. If the latter choice is made, the Court confines its review to the evidence adduced before the Patent

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permitting classification or valuation cases to be initiated by protest from a competing domestic manufacturer, after which the importer's consignee may be made a party to suit in the Customs Court, with appeal to the Court of Customs and Patent Appeals.

Office and to the questions of law preserved by the parties; its decision "shall be entered of record in the Patent Office and govern the further proceedings in the case." 35 U. S. C. § 144. The codification "omitted as superfluous" the last sentence in the existing statute: "But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question." Act of July 8, 1870, c. 230, § 50, 16 Stat. 198, 205; see Reviser's Note to 35 U. S. C. § 144.

The latter provision was evidently instrumental in prompting a decision of this Court, at a time when review of Patent Office determinations was vested in the Court of Appeals for the District of Columbia, that the ruling called for by the statute was not of a judicial character. *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 699. That is the most that the *Postum* holding can be taken to stand for, as *United States v. Duell*, 172 U. S. 576, 588-589, had upheld the judicial nature of the review in all other respects.<sup>45</sup> And the continuing vitality of the decision even to this extent has been seriously weakened if not extinguished by the subsequent holding in *Hoover Co. v. Coe*, 325 U. S. 79, 88, sustaining the justiciability of the alternative remedy by civil action even though the Court deemed "the effect of adjudication in equity the same as that of decision on appeal." See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals: Patent Office and Tariff Commission Cases, 18 G. W. L. Rev. 192, 194-198 (1950). .

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<sup>45</sup> Curiously, *Duell* was not cited in *Postum*, while the cases that were—*Frasch v. Moore*, 211 U. S. 1; *Atkins v. Moore*, 212 U. S. 285; *Baldwin Co. v. Howard Co.*, 256 U. S. 35—had, as the Court recognized, held only that the statutory scheme of review did not produce a "final judgment" as required by the statute then governing appeals to the Court.

At the time when *Postum* was decided, the proceeding in equity against the Patent Office was cumulative rather than alternative with the review by appeal, and it seems likely that it was this feature of the statute which caused the Court to characterize the judgment of the Court of Appeals as "a mere administrative decision." 272 U. S., at 698. Thereafter Congress made the remedies alternative, Act of March 2, 1927, c. 273, § 11, 44 Stat. 1335, 1336, and it was this amended jurisdiction that it later transferred to the Court of Customs and Patent Appeals, renaming the court in the process. Act of March 2, 1929, c. 488, 45 Stat. 1475.

It may still be true that Congress has given to the equity proceeding a greater preclusive effect than that accorded to decisions of the Court of Customs and Patent Appeals.<sup>46</sup> Even so, that circumstance alone is insufficient to make those decisions nonjudicial. *Tutun v. United States*, 270 U. S. 568, decided by the same Court as *Postum* and not there questioned, is controlling authority. For the Court there held that a naturalization proceeding in a Federal District Court was a "case" within the meaning of Article III, even though the Government was empowered by statute<sup>47</sup> to bring a later bill in equity for cancellation of the certificate.

Mr. Justice Brandeis, the author of the *Tutun* opinion, had also prepared the Court's opinion in *United States v. Ness*, 245 U. S. 319, which upheld the Government's right to seek denaturalization even upon grounds known to and

<sup>46</sup> See Stern and Gressman, *Supreme Court Practice* (1950), 44-46. But see *Hobart Mfg. Co. v. Landers, Frary & Clark*, 26 F. Supp. 198, 202, aff'd *per curiam*, 107 F. 2d 1016; *Battery Patents Corp. v. Chicago Cycle Supply Co.*, 111 F. 2d 861, 863; Reviser's Note, 35 U. S. C. § 144.

<sup>47</sup> Naturalization Act of June 29, 1906, c. 3592, § 15, 34 Stat. 596, 601.

asserted unsuccessfully by it in the naturalization court.<sup>48</sup> Proceedings in that court, the opinion explained, were relatively summary, with no right of appeal, whereas the denaturalization suit was plenary enough to permit full presentation of all objections and was accompanied with appeal as of right. 245 U. S., at 326. These differences made it reasonable for Congress to allow the Government another chance to contest the applicant's eligibility.

The decision in *Tutun*, coming after *Ness*, draws the patent and trademark jurisdiction now exercised by the Court of Customs and Patent Appeals fully within the category of cases or controversies. So much was recognized in *Tutun* itself, 270 U. S., at 578, where Mr. Justice Brandeis observed:

"If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit. 'It is in this respect,' as stated in *Johannessen v. United States*, 225 U. S. 227, 238, 'closely analogous to a public grant of land' (Rev. Stat., § 2289, etc.,) or of the *exclusive right to make, use and vend a new and useful invention* (Rev. Stat., § 4883, etc.).'" (Emphasis added.)

Like naturalization proceedings in a District Court, appeals from Patent Office decisions under 35 U. S. C. § 144 are relatively summary—since the record is limited to the evidence allowed by that office—and are not themselves subject to direct review by appeal as of right.<sup>49</sup> It

<sup>48</sup> For later developments, see *Schneiderman v. United States*, 320 U. S. 118, 123-125; *Knauer v. United States*, 328 U. S. 654, 671-673; *Chaunt v. United States*, 364 U. S. 350.

<sup>49</sup> We intimate no opinion whether 28 U. S. C. § 1256 was intended by Congress to make patent and trademark cases reviewable by certiorari in this Court. See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals, 18 G. W. L. Rev. 192, 194-198 (1950).

was as reasonable for Congress, therefore, to bind only the Patent Office on appeals and to give private parties whether or not participants in such appeals a further opportunity to contest the matter on plenary records developed in litigation elsewhere. This practice but furnishes a further illustration of the specialized jurisdiction of the Court of Customs and Patent Appeals, akin to that of the Commerce Court, in passing upon the consistency with law of expert administrative judgments without undertaking to conclude private parties in nonadministrative litigation. We conclude that the *Postum* decision must be taken to be limited to the statutory scheme in existence before the transfer of patent and trademark litigation to that court.

## X.

We turn finally to the more difficult questions raised by the jurisdiction vested in the Court of Customs and Patent Appeals by 28 U. S. C. § 1543 to review Tariff Commission findings of unfair practices in import trade, and the congressional reference jurisdiction given the Court of Claims by 28 U. S. C. §§ 1492 and 1509. The judicial quality of the former was called into question though not resolved in *Ex parte Bakelite Corp.*, 279 U. S. 438, 460-461,<sup>50</sup> while that of the latter must be taken to have been adversely decided, so far as susceptibility to Supreme Court review is concerned, by *In re Sanborn*, 148 U. S. 222.<sup>51</sup>

<sup>50</sup> Section 316 (c) of the Tariff Act of 1922, c. 356, 42 Stat. 858, 943, involved in *Bakelite*, was reenacted in virtually identical terms by § 337 (c) of the Tariff Act of 1930, 46 Stat. 590, 703, as amended, 19 U. S. C. § 1337 (c).

<sup>51</sup> *Sanborn* involved the departmental reference jurisdiction of the Court of Claims, since repealed by 67 Stat. 226 (1953); but the functions performed by the court in that case were not in substance different from those it still performs on request by Congress.

At the outset we are met with a suggestion by the Solicitor General that even if the decisions called for by these heads of jurisdiction are nonjudicial, their compatibility with the status of an Article III court has been settled by *O'Donoghue v. United States*, 289 U. S. 516, 545-548. It is true that *O'Donoghue* upheld the authority of Congress to invest the federal courts for the District of Columbia with certain administrative responsibilities—such as that of revising the rates of public utilities<sup>52</sup>—but only such as were related to the government of the District. See *Pitts v. Peak*, 60 U. S. App. D. C. 195, 197, 50 F. 2d 485, 487, cited and relied upon in *O'Donoghue*, 289 U. S., at 547-548.<sup>53</sup> To extend that holding to the wholly nationwide jurisdiction of courts whose seat is in the District of Columbia would be to ignore the special importance attached in the *O'Donoghue* opinion to the need there for an independent national judiciary.

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<sup>52</sup> See *Keller v. Potomac Electric Power Co.*, 261 U. S. 428.

<sup>53</sup> *Federal Radio Comm'n v. General Electric Co.*, 281 U. S. 464, which sustained the authority of the Court of Appeals for the District of Columbia to render an "administrative" decision respecting the issuance of a radio broadcasting license to a station in Schenectady, New York, was decided at a time when the courts of the District were regarded wholly as legislative courts. *Id.*, at 468.

It is significant that all of the jurisdiction at issue in the *Keller*, *Postum*, and *General Electric* cases has long since been transformed into judicial business. The change with respect to review of Patent Office decisions took place, as we have seen, p. 47, *supra*, before the transfer of that jurisdiction to the Court of Customs and Patent Appeals. Review of the Public Utilities Commission was restricted to questions of law upon the evidence before the Commission, in the Act of August 27, 1935, § 2, 49 Stat. 882, D. C. Code, 1961, § 43-705. See *Public Utilities Comm'n v. Pollak*, 343 U. S. 451, 458. And the Act of July 1, 1930, c. 788, 46 Stat. 844, likewise made review of the Radio Commission judicial, as was recognized in *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 274-278.

The restraints of federalism are, of course, removed from the powers exercisable by Congress within the District. For, as the Court early stated, in *Kendall v. United States*, 12 Pet. 524, 619:

"There is in this district, no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice."

Thus those limitations implicit in the rubric "case or controversy" that spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts, see Madison's Notes of the Debates, in II Farrand, *Records of the Federal Convention* (1911), 45-46, need have no application in the District. The national courts here may, consistently with those limitations, perform any of the local functions elsewhere performed by state courts.<sup>54</sup>

But those are not the only limitations embodied in Article III's restriction of judicial power to cases or con-

<sup>54</sup> The D. C. Code, 1961, Tit. 11, c. 5, establishes a special term of the United States District Court as a probate court, whereas the other Federal District Courts have been debarred from exercising such a jurisdiction as one traditionally within the domain of the States. *Byers v. McAuley*, 149 U. S. 608, 619. Similarly, the divorce proceedings maintainable under the general jurisdictional grant, D. C. Code, § 11-306; see *Bottomley v. Bottomley*, 104 U. S. App. D. C. 311, 262 F. 2d 23, are beyond the ken of the federal courts in the States. *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 383.

The appointing authority given judges of the District Court to select members of the Board of Education and of the Commission on Mental Health, D. C. Code, §§ 31-101, 21-308, is probably traceable to Art. II, § 2 of the Constitution. See note 10, *supra*; *Ex parte Siebold*, 100 U. S. 371, 397-398.

troversies. The restriction expresses as well the Framers' desire to safeguard the independence of the judicial from the other branches by confining its activities to "cases of a Judiciary nature," see II Farrand, *op cit., supra*, at 430, and in this respect it remains fully applicable at least to courts invested with jurisdiction solely over matters of national import. Our question is whether the independence of either the Court of Claims or the Court of Customs and Patent Appeals has been so compromised by its investiture with the particular heads of jurisdiction described above as to destroy its eligibility for recognition as an Article III court.

The jurisdictional statutes in issue, § 337 of the Tariff Act of 1930 and 28 U. S. C. §§ 1492, 2509, appear to subject the decisions called for from those courts to an extrajudicial revisory authority incompatible with the limitations upon judicial power this Court has drawn from Article III. See, e. g., *Chicago & Southern Air Lines, Inc., v. Waterman S. S. Corp.*, 333 U. S. 103, 113-114; *Hayburn's Case*, 2 Dall. 409. Whether they actually do so is not, however, entirely free from difficulty, and cannot in our view appropriately be decided in a vacuum, apart from the setting of particular cases in which we may gauge the operation of the statutes. For disposition of the present cases, we think it is sufficient simply to note the doubt attending the validity of the jurisdiction, and to proceed on the assumption that it cannot be entertained by an Article III court.

It does not follow, however, from the invalidity, actual or potential, of these heads of jurisdiction, that either the Court of Claims or the Court of Customs and Patent Appeals must relinquish entitlement to recognition as an Article III court. They are not tribunals, as are for example the Interstate Commerce Commission or the Federal Trade Commission, a substantial and integral part of whose business is nonjudicial.

The overwhelming majority of the Court of Claims' business is composed of cases and controversies. See pp. 45-46, *supra*. In the past year, it heard only 10 reference cases, Annual Report of the Administrative Office of the United States Courts (1961), 318; and its recent annual average has not exceeded that figure, Pavenstedt, *The United States Court of Claims as a Forum for Tax Cases*, 15 Tax L. Rev. 1, 6 n. 23 (1959). The tariff jurisdiction of the Court of Customs and Patent Appeals is of even less significant dimensions. In the past fiscal year, that court disposed of 41 customs cases and 112 patent or trademark cases, but heard no appeals from the Tariff Commission. Annual Report of the Administrative Office of the United States Courts (1961), 318. Indeed we are advised that in all the years since 1922, when the predecessor to § 337 of the Tariff Act was first enacted, the Court of Customs and Patent Appeals has entertained only six such cases.<sup>55</sup> Certainly the status of a District Court or Court of Appeals would not be altered by a mere congressional attempt to invest it with such insignificant nonjudicial business; it would be equally perverse to make the status of these courts turn upon so minuscule a portion of their purported functions.

The Congress that enacted the assignment statute with its accompanying declarations was apprised of the possibility that a re-examination of the *Bakelite* and *Williams* decisions might lead to disallowance of some of these courts' jurisdiction. See 99 Cong. Rec. 8944 (1953) (remarks of Senator Gore); 104 Cong. Rec. 17549 (1958) (remarks of Senator Talmadge). Nevertheless it chose to pass the statute. We think with it that, if necessary, the particular offensive jurisdiction, and not the courts, would fall.

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<sup>55</sup> Brief on behalf of the chief judge and the associate judges of the United States Court of Customs and Patent Appeals as *amici curiae*, p. 10.

## CONCLUSIONS.

Since the Court of Claims and the Court of Customs and Patent Appeals are courts created under Article III, their judges—including retired judges, *Booth v. United States*, 291 U. S. 339, 350–351—are and have been constitutionally protected in tenure and compensation. Our conclusion, it should be noted, is not an *ex post facto* resurrection of a banished independence. The judges of these two courts have never accepted the dependent status thrust at them by the *Bakelite* and *Williams* decisions. See, e. g., Judge Madden writing for the Court of Claims in *Pope v. United States*, 100 Ct. Cls. 375, 53 F. Supp. 570, rev'd, 323 U. S. 1. The factors set out at length in this opinion, which were not considered in the *Bakelite* and *Williams* opinions, make plain that the differing conclusion we now reach does no more than confer legal recognition upon an independence long exercised in fact.

That recognition suffices to dispose of the present cases. For it can hardly be contended that the specialized functions of these judges deprives them of capacity, as a matter of due process of law, to sit in judgment upon the staple business of the District Courts and Courts of Appeals. Whether they should be given such assignments may be and has been a proper subject for congressional debate, e. g., 62 Cong. Rec. 190–191, 207–209 (1921), but once legislatively resolved it can scarcely rise to the dignity of a constitutional question. To be sure, a judge of specialized experience may at first need to devote extra time and energy to familiarize himself with criminal, labor relations, or other cases beyond his accustomed ken. But to elevate this temporary disadvantage into a constitutional disability would be tantamount to suggesting that the President may never appoint to the bench a lawyer whose life's practice may have been

devoted to patent, tax, antitrust, or any other specialized field of law in which many eminently well-qualified lawyers are wont to engage. The proposition will not, of course, survive its statement.

The judgments of the Courts of Appeals are

*Affirmed.*

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES

ERI

Nos. 242 AND 481.—OCTOBER TERM, 1961.

The Glidden Company, etc., Petitioner, 242 v. Olga Zdanok et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
Benny Lurk, Petitioner, 481 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1962.]

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE joins, concurring in the result.

I cannot agree to the unnecessary overruling of *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929), and *Williams v. United States*, 289 U. S. 553 (1933). Both were unanimous opinions by most distinguished Courts,<sup>1</sup> headed in the *Bakelite* case by Chief Justice Taft and in *Williams* by Chief Justice Hughes.

Long before *Glidden v. Zdanok* was filed, the Congress had declared the Court of Claims "to be a court established under Article III of the Constitution of the United States." Act of July 28, 1953, § 1, 67 Stat. 226. Not that this *ipse dixit* made the Court of Claims an Article III court, for it must be examined in light of the congressional power exercised and the jurisdiction enjoyed, together with the characteristics of its judges. But the 1953 Act

<sup>1</sup> *Bakelite*: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford and Stone; in *Williams*: Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts and Cardozo.

did definitely establish the intent of the Congress, which prior to that time was not clear in light of the *Williams* holding 20 years earlier that it was not an Article III court.

It is my belief that prior to 1953 the Court of Claims had all of the characteristics of an Article III court—jurisdiction over justiciable matters, issuance of final judgments, judges appointed by the President with consent of the Senate—save as to the congressional reference matters. It was the fact that a substantial portion of its jurisdiction consisted of congressional references that compelled the decision in *Williams* that it was not an Article III court and therefore the salaries of its judges could be reduced.<sup>2</sup> Since that time the Article III jurisdiction of the Court of Claims has been enlarged by including original jurisdiction under several Acts, e. g., suits against the United States for damages for unjust conviction, Act of May 24, 1938, §§ 1-4, 52 Stat. 438, 28 U. S. C. § 1495, and appellate jurisdiction over tort suits against the United States tried in the District Courts, Act of Aug. 2, 1946, § 412 (a)(2), 60 Stat. 844, 28 U. S. C. § 1504, and over suits before the Indian Claims Commission, Act of May 24, 1949, § 89 (a), 63 Stat. 102, 15 U. S. C. § 1505. In addition, the former jurisdiction over questions referred by the Executive branch was with-

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<sup>2</sup> "From the outset Congress has required it [the Court of Claims] to give merely advisory decisions on many matters. Under the act creating it all of its decisions were to be of that nature. Afterwards some were to have effect as binding judgments, but others were still to be merely advisory. This is true at the present time." *Williams v. United States, supra*, at 569 (quoting from *Ex parte Bakelite*).

"Further reflection tends only to confirm the views expressed in the *Bakelite* opinion . . . and we feel bound to reaffirm and apply these. And, giving these views due effect here, we see no escape from the conclusion that if the Court of Customs Appeals is a legislative court, so also is the Court of Claims." *Williams*, at 571. The *Bakelite* decision was posited squarely on the legislative reference function. See *Ex parte Bakelite, supra*, 454-458.

drawn in 1953. Act of July 28, 1953, § 8, 67 Stat. 226. The result is that practically all of the court's jurisdiction is now comprised of Article III cases. And I read the 1953 Act as unequivocally expressing Congress' intent that this court—the jurisdiction of which was then almost entirely over Article III cases—should be an Article III court, thereby irrevocably establishing life tenure and irreducible salaries for its judges.

It is true that Congress still makes legislative references to the court, averaging some 10 a year. The acceptance of jurisdiction of either executive or legislative references calling for advisory opinions has never been honored by Article III courts. Indeed, this Court since 1793 has consistently refused so to act. Correspondence of the Justices, 3 Johnston, Correspondence and Public Papers of John Jay (1891), 486-489. *Musk-rat v. United States*, 219 U. S. 346 (1911). I do not construe the legislative history of the 1953 Act to be so clear as to require the Court of Claims to carry on this function, which appears to be minuscule. On the contrary, the congressional mandate clearly and definitely declared the court "to be established under Article III." I would carry out that mandate. In my view the Court of Claims, if and when such a reference occurs, should with due deference advise the Congress, as this Court advised the President 169 years ago, that it could not render advisory opinions.

Likewise I find that the Court of Customs and Patent Appeals has been an Article III court since 1958. It was created by the Congress in 1909 to exercise exclusive appellate jurisdiction over customs cases. Payne-Aldrich Tariff Act of Aug. 5, 1909, 36 Stat. 11, 105-108. At that time these cases were reviewed by Circuit Courts of Appeals—clearly of Article III status—36 Stat. 106, and they have since been considered on certiorari by this Court

without suggestion that they were not "cases" in the Article III sense. *E. g., The Five Per Cent. Discount Cases*, 243 U. S. 47 (1917).<sup>3</sup> The Congress enlarged the jurisdiction of the Court of Customs and Patent Appeals in 1922 to include appeals on questions of law from Tariff Commission findings in proceedings relating to unfair practices in the import trade. Tariff Act of 1922, 42 Stat. 943, 944. In 1929 this Court in *Bakelite*, *supra*, which involved a tariff matter, found these references to be of an advisory nature and on this basis declared the Court of Customs and Patent Appeals to be a legislative rather than an Article III court. The *Bakelite* decision indicates that this Court was of the impression that the tariff jurisdiction of the Court of Customs and Patent Appeals would be significant. However, since that time that court has handled but four such references—and only one in the last 27 years. At about the same time that the *Bakelite* opinion came down, Congress transferred the appellate jurisdiction in patent and trademark cases from the Court of Appeals of the District of Columbia to the Court of Customs and Patent Appeals. Act of March 2, 1929, §§ 1, 2, 45 Stat. 1475. Thus contrary to the apparent assumption in *Bakelite*, the business of that court now consists exclusively of Article III cases—with tariff references practically nonexistent (one in the last 27 years). In view of this evolution of its jurisdiction, I believe the court became an Article III court upon the clear manifestation of congressional intent that it be such. Act of Aug. 25, 1958, § 1, 72 Stat. 848.

As I have indicated, *supra*, the handling of the tariff references—numbering only 6 in 40 years—is not an

<sup>3</sup> That its original jurisdiction was in "cases" in the Article III § 2 sense cannot be questioned. See *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 198 (1928); *Osborn v. Bank of U. S.*, 9 Wheat. 738, 819 (1824); *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 487 (1894); *Tatum v. United States*, 270 U. S. 568, 576-577 (1926).

Article III court function. The Congress has declared the Court of Customs and Patent Appeals to be an Article III court. It should, therefore, if and when such a case arose, with due deference refuse to exercise such jurisdiction.<sup>4</sup>

I see nothing in the argument that the 1953 and 1958 Acts so changed the character of these courts as to require new presidential appointments. Congress was merely renouncing its power to terminate the functions or reduce the tenure or salary of the judges of the courts. Much more drastic changes have been made without reappointment.<sup>5</sup> And there is no significance to the fact that Judge Jackson, who presided over the Lurk trial, was not in active status in 1958 when Congress declared his court to be an Article III court. He remained in office as a judge of that court even though retired, cf. *Booth v. United States*, 291 U. S. 339 (1934), and his judgeship was controlled by any act concerning the jurisdiction of that court or the status of its judges.

I would affirm.

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<sup>4</sup>The validity of Judge Jackson's participation, as the government points out, might be also sustained under the Act of September 14, 1922, c. 306, § 35, 42 Stat. 837, 839, which provided for the assignment of judges of the Court of Custom Appeals to the courts of the District of Columbia. This Act was on the books when Judge Jackson took his seat on the Court of Customs and Patent Appeals as well as when the *Lurk* case was tried.

<sup>5</sup>Nor does my holding carry any implication that judgments entered prior to the date of these Acts in which judges of these courts participated might be collaterally attacked. *Ex parte Ward*, 173 U. S. 452 (1899).

# SUPREME COURT OF THE UNITED STATES

Nos. 242 AND 481.—OCTOBER TERM, 1961.

The Glidden Company, etc., Petitioner,	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
242                    v. Olga Zdanok et al.	
Benny Lurk, Petitioner, 481                    v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1962.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The decision in these cases has nothing to do with the character, ability, or qualification of the individuals who sat on assignment on the Court of Appeals in No. 242 and on the District Court<sup>1</sup> in No. 481. The problem is an

<sup>1</sup> The District Court of the District of Columbia, like the "inferior courts" established by Congress under Art. III, § 1, of the Constitution, is an Article III court (*O'Donoghue v. United States*, 289 U. S. 516), even though it possesses powers that Article III courts could not perform. Congress, acting under its plenary power granted by Art. I, § 8, to legislate for the District of Columbia, has from time to time vested in the courts of the District administrative and even legislative powers. See, e. g., *Keller v. Potomac Electric Co.*, 261 U. S. 428, 440-443 (review of rate making); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 698-701 (patent and trademark appeals); *Federal Radio Comm'n v. General Electric Co.*, 281 U. S. 464, 467-468 (review of radio station licensing; cf. *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 274-278). Congress has also authorized District Court judges to appoint members of the Board of Education. D. C. Code § 31-101.

In *O'Donoghue v. United States*, *supra*, at 545, the Court said: "The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over non-federal causes

impersonal one, concerning the differences between an Article I court and an Article III court. My Brother HARLAN calls it a problem of a "highly theoretical nature." Far from being "theoretical" it is intensely practical, for it deals with powers of judges over the life and liberty of defendants in criminal cases and over vast property interests in complicated trials customarily involving the right to trial by jury.

Prior to today's decision the distinction between the two courts had been clear and unmistakable. By Art. I, § 8, Congress is given a wide range of powers, including the power "to pay the Debts" of the United States and the power to "lay and collect Taxes, Duties, Imports and Excises." By Art. I, § 8, Congress is also given the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Pursuant to the latter—the Necessary and Proper Clause—the Court of Claims was created "to pay the Debts";<sup>2</sup> and

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of action, or over quasi-judicial or administrative matters, does not affect the question. In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state."

The eighteenth-century courts in this country performed many administrative functions. See Pound, *Organization of Courts* (1940), pp. 88-89. The propriety of the union of legislative and judicial powers in a *state* court was assumed in *Prentis v. Atlantic Coast Line*, 211 U. S. 210.

<sup>2</sup> "Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

"Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress

the Court of Customs and Patent Appeals was created in furtherance of the collection of duties. My Brother HARLAN shows that the Court of Customs Appeals traces back to the Payne-Aldrich Tariff Act of August 5, 1909, which should be proof enough that it is an administrative court, performing essentially an executive task.<sup>3</sup>

In *Williams v. United States*, 289 U. S. 553, the Court in a unanimous decision written by Mr. Justice Suther-

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makes specific provision therefore. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

"The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies." *Ex parte Bakelite Corp.*, 279 U. S. 438, 451-452.

<sup>3</sup>"The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rules of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings." *Ex parte Bakelite Corp.*, *supra*, note 2, at 458.

land held that the Court of Claims, though exercising judicial power, was an Article I court. And in *Ex parte Bakelite Corp.*, 279 U. S. 438, the Court in a unanimous opinion written by Mr. Justice Van Devanter held the Court of Customs Appeals to be an Article I court. Taft was Chief Justice when *Ex parte Bakelite* was decided. Hughes was Chief Justice when *Williams v. United States* was decided. I mention the two regimes that filed the unanimous opinions in those cases to indicate the vintage of the authority which decided them. Their decisions, of course, do not bind us, for they dealt with matters of constitutional interpretation which are always open. Yet no new history has been unearthed to show that the Taft and the Hughes Courts were wrong on the technical, but vitally important, question now presented.

Mr. Justice Van Devanter in *Ex parte Bakelite* marked the line between the Court of Claims and the Court of Customs and Patent Appeals on the one hand and the District Courts and Courts of Appeals on the other:

“Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.” *Id.* at 449.

My Brother HARLAN emphasizes that both Judge Madden of the Court of Claims and Judge Jackson of the Court of Customs and Patent Appeals "enjoy statutory assurance of tenure and compensation"; and so they do. But that statement reveals one basic difference between an Article III judge and an Article I judge. The latter's tenure is *statutory* and *statutory only*; Article I contains no guarantee that the judges of Article I courts have life appointments. Nor does it provide that their salaries may not be reduced during their term of office. On the other hand, the tenure of an Article III judge is for "good behaviour"; moreover, Article III provides that its judges shall have a compensation that "shall not be diminished during their Continuance in Office." See *O'Malley v. Woodrough*, 307 U. S. 277. To repeat, there is not a word in Article I giving its courts such protection in tenure or in salary. A constitutional amendment would be necessary to supply Article I judges with the guarantees of tenure and salary that Article III gives its judges. The majority attempt to evade this problem by looking to so-called "Congressional intent" to find the creation of an Article III court. Congress, however, has always understood that it was only establishing Article I courts when it created the Court of Claims and the Court of Customs and Patent Appeals. The tenure it affixed to the judges of those tribunals was of necessity statutory only, as no mandate or requirement of Article I was involved.

The importance of these provisions to the independence of the judiciary needs no argument. Hamilton stated the entire case in the Federalist No. 79 (Lodge ed. 1879), p. 491:

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made

in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided that the judges of the United States 'shall at *stated times* receive for their services a compensation which shall not be diminished during their continuance in office.'

"This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less

eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. . . .

"This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.

"The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for misconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges."

We should say here what was said in *Toth v. Quarles*,  
350 U. S. 11, 17:

". . . the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals."

Tenure that is guaranteed by the Constitution is a badge of a judge of an Article III court. The argument that mere *statutory* tenure is sufficient for judges of Article III courts was authoritatively answered in *Ex parte Bakelite Corp., supra*, at 459-460:

" . . . the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred. Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. *The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges and declared that they should hold their offices during good behavior; and yet the status of the judges was the same as it would have been had that declaration been omitted.* In creating courts for some of the Territories Congress failed to include a provision fixing the tenure of the judges; but the courts became legislative courts just as if such a provision had been included." (Italics added.)

Congress could make members of the Interstate Commerce Commission lifetime appointees. Yet I suppose no one would go so far as to say that a member of the Interstate Commerce Commission could be assigned to sit on the District Court or on the Court of Appeals. But if any agency member is disqualified, why is a member of another Article I tribunal, *viz.*, the Court of Claims or the Court of Customs and Patent Appeals, qualified? No distinction can be drawn based on the functions performed by the Interstate Commerce Commission and those performed by the other two legislative tribunals. In each case

some adjudicatory functions are performed.\* Though the judicial functions of the Interstate Commerce Commission are as distinct as those of the Court of Claims, they nevertheless derive from Article I; and they are functions that Congress can exercise directly or delegate to an agency. *Williams v. United States, supra*, pp. 567-571. To make the present decision turn on whether the Court of Claims and the Court of Customs and Patent Appeals perform "judicial" functions is to adopt a false standard. The manner in which the majority reasons exposes the fallacy.

The majority says that once the United States consents to be sued all problems of "justiciability" are satisfied; and that Congress has broad powers to convert "moral" obligations into "legal" ones enforceable by "constitutional" courts. The truth is, I think, that the dimensions of Article III can be altered only by the amending process, not by legislation. Congress can create as respects certain claims a limited "justiciability." But if "justiciability" in the "constitutional" sense is involved, then there must be trial by jury assuming, as my Brother HARLAN does, that the claim is for recovery for torts or some other compensable injury. To repeat, it does not advance analysis by calling the function a "judicial" one (see *Pope v. United States*, 323 U. S. 1, 12), for both Article I courts and Article III courts perform functions of that character. The crucial question on this phase of the problems is the manner in which that judicial power is to be exercised.

As Mr. Justice Brandeis made clear in *Tutun v. United States*, 270 U. S. 568, 576-577, an administrative remedy

\*The Interstate Commerce Commission has long entered reparation orders directing carriers to pay shippers specified sums of money plus interest for excessive and unreasonable rates. See *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 434; II Sharfman, *The Interstate Commerce Commission* (1937), pp. 387-388.

may be "judicial." The question here is different; it is whether the procedures utilized by the tribunal must comport to that set forth in the Bill of Rights and in the body of the Constitution. Yet who would maintain that in an administrative action for damages a jury trial was necessary?

Judges of the Article III courts work by standards and procedures which are either specified in the Bill of Rights or supplied by well-known historic precedents. Article III courts are *law courts*, *equity courts*, and *admiralty courts*<sup>5</sup>—all specifically named in Article III. They sit to determine "cases" or "controversies." But Article I courts have no such restrictions. They need not be confined to "cases" or "controversies" but can dispense legislative largesse. See *United States v. Tillamooks*, 329 U. S. 40; 341 U. S. 48. Their decisions may affect vital interests; yet like legislative bodies, zoning commissions, and other administrative bodies they need not observe the same standards of due process required in trials of Article III "cases" or "controversies." See *Bi-Metallic Co. v. Colorado*, 239 U. S. 411. That is what Chief Justice Marshall meant when he said in *American Ins. Co. v. Canter*, 1 Pet. 511, 545–546, that an Article I court (is

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<sup>5</sup> As respects admiralty, Chief Justice Marshall said in *American Ins. Co. v. Canter*, 1 Pet. 511, 545:

"If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.'

"The Constitution certainly contemplates these as three distinct classes of cases . . . ."

that case a territorial court) could make its adjudications without regard to the limitations of Article III. On the other hand, as the Court in *O'Donoghue v. United States*, *supra*, at 546, observed, Article III courts could not be endowed with the administrative and legislative powers (or with the power to render advisory opinions) which Article I tribunals or agencies exercise.

In other words, the question, apart from the constitutional guarantee of tenure and the provision against diminution of salary, concerns the functions of the particular tribunal. Article III courts have prescribed for them constitutional standards some of which are in the Bill of Rights, while some (as for example those concerning bills of attainder and *ex post facto* laws) are in the body of the Constitution itself. Article I courts, on the other hand, are agencies of the legislative or executive branch. Thus while Article III courts of law must sit with a jury in suits where the value in controversy exceeds \$20, the Court of Claims—an Article I court—is not so confined by the Seventh Amendment. The claims which it hears are claims with respect to which the government has agreed to be sued. As the Court said in *McElrath v. United States*, 102 U. S. 426, 440, since the jurisdiction of the Court of Claims is permissive only, Congress can prescribe the rules and the procedures to be followed in pursuing claims against the Government. Likewise, the Court of Customs Appeals hears appeals that "include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers." *Ex parte Bakelite Corp., supra*, at 458.

The judicial functions exercised by Article III courts cannot be performed by Congress nor delegated to

agencies under its supervision and control.\* The bill of attainder is banned by Art. I, § 9. If there is to be punishment, courts (in the constitutional sense) must admin-

\* The limitations on Article III courts that distinguish them from Article I courts were stated by Chief Justice Vinson in *National Insurance Co. v. Tidewater Co.*, 337 U. S. 582, 629-630, in words that have, I think, general acceptance, though on the precise issue he wrote in dissent:

"In *Keller v. Potomac Electric Co.*, 261 U. S. 428 (1923), where this Court had before it an Act under which the courts of the District of Columbia were given revisory power over rates set by the Public Utilities Commission of the District, the appellee sought to sustain the appellate jurisdiction given this Court by the Act on the basis that 'Although Art. III of the Constitution limits the jurisdiction of the federal courts, this limitation is subject to the power of Congress to enlarge the jurisdiction, where such enlargement may reasonably be required to enable Congress to exercise the express powers conferred upon it by the Constitution.' 261 U. S., at 435. There, as here, the power relied upon was that given Congress to exercise exclusive jurisdiction over the District of Columbia, and to make all laws necessary and proper to carry such powers into effect. But this Court clearly and unequivocally rejected the contention that Congress could thus extend the jurisdiction of constitutional courts, citing the note to *Hayburn's Case*, 2 Dall. 409, 410 (1792); *United States v. Ferreira*, 13 How. 40, note, p. 52 (1851), and *Gordon v. United States*, 117 U. S. 697 (1864). These and other decisions of this Court clearly condition the power of a constitutional court to take cognizance of any cause upon the existence of a suit instituted according to the regular course of judicial procedure, *Marbury v. Madison*, 1 Cranch 137 (1803), the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decisions, *Muskrat v. United States*, 219 U. S. 346 (1911); *Gordon v. United States*, *supra*, the absence of revisory or appellate power in any other branch of Government, *Hayburn's Case*, *supra*; *United States v. Ferreira*, *supra*, and the absence of administrative or legislative issues or controversies, *Keller v. Potomac Electric Co.*, *supra*; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 632 (1927)."

ister it. As we stated in *United States v. Lovett*, 328 U. S. 303, 317:

"Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts."

Moreover, when an Article III court of law acts, there is a precise procedure that must be followed:

"An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him." *Id.*, 317-318.

On the civil side there is not only the right to trial by jury in suits at common law where the value in controversy exceeds \$20 but there is also the mandate of the Seventh Amendment directing that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Neither of these limitations is germane to litigation in the Court of Claims or in the Court of Customs and Patent Appeals. Those courts, moreover, exercise no criminal jurisdiction, no admiralty jurisdiction, no equity jurisdiction.

As noted, the advisory opinion is beyond the capacity of Article III courts to render. *Muskrat v. United States*, 219 U. S. 346. Yet it is part and parcel of the function of legislative tribunals.<sup>7</sup>

Thus I cannot say, as some do, that the distinction between the two kinds of courts is a "matter of language."<sup>8</sup> The majority over and again emphasizes the declaration by Congress that each of the courts in question is an Article III court. It seems that the majority tries to gain momentum for its decision from those congressional declarations. This Court, however, is the expositor of the meaning of the Constitution, as *Marbury v. Madison*, 1 Cranch 137, held; and a congressional enactment in the field of Article III is entitled to no greater weight than in other areas. The declarations by Congress that these legislative tribunals are Article III courts<sup>9</sup> would be determinative only if Congress had the power to modify or alter the concepts that radiate throughout Article III and throughout those provisions of the Bill of Rights that specify how the judicial power granted by Article III shall be exercised.

An appointment is made by the President and confirmed by the Senate in light of the duties of the particular office. Men eminently qualified to sit on Article I tribunals or agencies are not picked or confirmed in light of their qualifications to preside at jury trials or to

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<sup>7</sup> See 28 U. S. C. § 1492, giving the Court of Claims power "to report to either House of Congress on any bill referred to the court by such House." And see 28 U. S. C. §§ 2509, 2510. 28 U. S. C. § 1542 gave the Court of Customs and Patent Appeals a kind of administrative review over certain decisions of the patent office. And see note 2, *supra*.

<sup>8</sup> See H. R. Rep. No. 2348, 84th Cong., 2d Sess., p. 3.

<sup>9</sup> See Act of July 28, 1953, 67 Stat. 226 (Court of Claims); Act of July 14, 1956, 70 Stat. 532 (Customs Court); Act of August 25, 1958, 72 Stat. 848 (Court of Customs and Patent Appeals).

process on appeal the myriad of constitutional and procedural problems involved in Article III "cases" or controversies." A President who sent a name to the Senate for the Interstate Commerce Commission or Federal Trade Commission might never dream of entrusting him with the powers of an Article III judge. The tasks are so different, the responsibilities and the qualifications so diverse that it is difficult for one who knows the federal system to see how in the world of practical affairs these offices are interchangeable.

In the Senate debate on the Court of Customs Appeals, Senator Cummins stated that the judges who were to man it were to become tariff "experts" whose judicial business would be "confined to the matter of the duties on imports." 44 Cong. Rec. 4185. Senator McCumber, who spoke for the Committee, emphasized the technical nature of the work of those judges and the unique specialization of their work.

"The law governing the development of the human intellect is such that constant study of a particular question necessarily broadens and expands and intensifies and deepens the mind on that particular subject. Any man who has gone over even the cotton schedule will understand how delicate questions will arise; how complex those questions must necessarily be, and how necessary it will be to have judges who will possess technical knowledge upon that subject; and a technical knowledge can only be obtained by a constant daily study of those questions. For that second reason it was thought best to have a court whose whole attention, whose whole life work, should be given to that particular subject." *Id.*, at 4199.

Could there be any doubt that the late John J. Parker, rejected by the Senate for this Court, would have been confirmed for one of these Article I courts?

It is said that Congress could separate law and equity and create federal judges who, though Article III judges, sit entirely on the equity side. If Congress can do that, it is said that Congress can divide up all judicial power as it chooses and by making tenure permanent allow judges to be assigned from an Article I to an Article III court. The fact that Article III judicial power may be so divided as to produce judges with no experience in the trial of jury cases or in the review of them on appeal is no excuse for allowing legislative judges to be imported into the important fields that Article III preserves and that are partly safeguarded by the Bill of Rights and partly represented by ancient admiralty practice<sup>10</sup> and equity procedures. Federal judges named to Article III courts are picked in light of the functions entrusted to them. No one knows whether a President would have appointed to an Article III court a man he named to an Article I court.

My view is that we subtly undermine the constitutional system when we treat federal judges as fungible. If members of the Court of Claims and of the Court of Customs and Patent Appeals can sit on life-and-death cases in Article III courts, so can a member of any administrative agency who has a *statutory* tenure that future judges sitting on this Court by some mysterious manner may change to constitutional tenure. With all deference, this seems to me to be a light-hearted treatment of Article III functions.<sup>11</sup> Men of highest quality chosen as Article I judges might never pass muster for Article III

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<sup>10</sup> See *The Lottawanna*, 21 Wall. 558, 575; *The Osceola*, 189 U.S. 158.

<sup>11</sup> The Court does great mischief in today's opinions. The opinion of my Brother HARLAN stirs a host of problems that need not be opened. What is done will, I fear, plague us for years.

First, that opinion cites with approval *Ex parte McCordle*, 7 Wall. 506, in which Congress withdrew jurisdiction of this Court to review a *habeas corpus* case that was *sub judice* and then apparently draws

courts when tested by their record of tolerance for minorities and for their respect of the Bill of Rights—neither of which is as crucial to the performance of the duties of those who sit in Article I courts as it is to the duties of Article III judges.

In sum, judges who do not perform Article III functions do not enjoy *constitutional* tenure nor are their salaries *constitutionally* protected against diminution during their term of office cannot be Article III judges.

Judges who perform "judicial" functions on Article I courts do not adjudicate "cases" or "controversies" in the sense of Article III. They are not bound by the requirements of the Seventh Amendment concerning trial by jury.

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a distinction between that case and *United States v. Klein*, 13 Wall. 128, where such withdrawal was not permitted in a property claim. There is a serious question whether the *McCordle* case could command a majority view today. Certainly the distinction between liberty and property (which emanates from this portion of my Brother HARLAN's opinion) has no vitality even in terms of the Due Process Clause.

Second, *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, is apparently overruled. Why this is done is not apparent. That case ruled on the question whether a ruling on a Patent Office determination was "judicial." Whether it was or not is immaterial because, as already noted, Article I courts, like Article III courts, exercise "judicial" power. The only relevant question here is whether a court that need not follow Article III procedures is nonetheless an Article III court.

Third, it is implied that Congress could vest the lower federal courts with the power to render advisory opinions. The character of the District Court in the District of Columbia has been differentiated from the other District Courts by *O'Donoghue v. United States*, *supra*, in that the former is, in part, an agency of Congress to perform Article I powers. How Congress could transform regular Article III courts into Article I courts is a mystery. Certainly we should not decide such an important issue so casually and so unnecessarily.

Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights as well as the other guarantees in the main body of the Constitution, including the ban on bills of attainder and *ex post facto* laws, were designed. Judges who might be confirmed for an Article I court, might never pass muster for the onerous and life-or-death duties of Article III judges.

For these reasons I would reverse the judgments below.